Supreme Court, U.S.
FILED
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No. 87-2066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC. and W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

— VS. —

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

EDWARD BRODSKY
SPENGLER CARLSON GUBAR BRODSKY & FRISCHLING
Counsel for Petitioners
520 Madison Avenue
New York, New York 10022
(212) 935-5000

THOMAS B. RUTTER
RUTTER, TURNER, SOLOMON & DIPIERO
Counsel for Respondent
The Curtis Center, Suite 750
Independence Square West
Philadelphia, Pennsylvania 19106
(215) 925-9200

Petition for Certiorari Filed June 17, 1988
Certiorari Granted June 26, 1989

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PLAINTIFFS

ENVIRONMENTAL TECTONICS

DEFENDANTS

W.S. KIRKPATRICK INC., DEVELOPMENT INTERNATIONAL CORPORATION, DIC (HOLDING, Inc., IDC INTERNATIONAL S.A. LUXEMBOURG, HARRY G. CARPENTER c/o W.S. Kirkpatrik, Inc.
and
BENSON "TUNDE" AKINDELE

JOHN M. KRANKEL, EMRO ENGINEERING CO., INC. ROBERT W. RUPPERT c/o EMRO ENGINEERING CO., INC., ROSS E. SAXON c/o NAUTILUS ENVIRONMENTAL SYSTEMS, INC. & R.H. EDWARDS

Other contract. LDD

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

ATTORNEYS

Rutter, Turner & Stein, Esqs.
209 Haddon Avenue
Haddonfield, New Jersey 08033

Clapp & Eisenberg, P.C.
80 Park Plaza
Newark, NJ 07102
201-642-3900
(R.H. Edwards)

Lowenstein, Sandler, Brochin, Kohl, Fisher,
Boylan & Meanor, Esqs.
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-8700
(Harry Carpenter)

Sills, Beck, Cummins, Zuckerman, Radin, Tischman
& Epstein, Esqs.
33 Washington Street
Newark, New Jersey 07102-3197
W.S. Kirkpatrick Inc. & Co. Inc.
Development Industrial Corporation and DIC (Holding) Inc.

Dominic F. Amorosa, Esq.
86 Stewart Road
Short Hills, NJ 07078
201-467-7999
John M. Krankel

JS6 5-6-87

DATE	NR.	PROCEEDINGS
-4-86	1	Complaint, fld 2-26-86.
-4-86		Summons issued (20 days) as to WS Kirkpatrick Inc. & Harry G. Carpenter
-4-86		Summons issued (35 days) as to Development Intern'l, DIC Inc., IDC international [sic]* and Benson Akindele.
-4-86	2	Notice of allocation and assignment fld. (Newark-Stern).

* This Appendix is an exact reproduction of the documents as they appear in the Court record; the typographical errors have not been noted.

-17-86	3	Notice of motion by plaintiff for an order directing certain accelerated discovery, ret. 3-14-86 and proof of service, fld. 3-14-86. (Brief submitted)
-31-86	4	Notice of motion by plaintiff to admit Thomas B. Rutter, Esq. pro hac vice, ret. 4-28-86, statement in lieu of brief and proof of service fld.
-14-86	5	Notice and acknowledgment of receipt of summons & complaint on deft. W. S. Kirpatrick, Inc. 4-4-86, fld.
-14-86	6	Clerk's order extending time of deft. Harry G. Carpenter to answer to May 9, 1986, fld. N/M
-21-86	7	Stipulation and order extending tiem of deft. W.S. Kirpatrick Inc. to answer to May 5, 1986 and defts. Development International Corp. and DIC Holdiing Inc. to answer to May 19, 1986, fld. (Stern) N/M
-28-86	8	Order admitting Thomas B. Rutter, Esq. pro hac vice on behalf of pltf., fld. (Hedges) N/M
-2-86		At call for hearing on plaintiff's motion to admit Thomas B. Rueter, Esq. pro hac vice. Court indicated motion to be decided pursuant to Rule 78. (Hedges) (4-28-86)
5-6-86	9	Order re discovery: scheduling deposition; granting plaintiff leave to file an amended complaint, etc., fld. (Hedges) N/M

5-8-86	10	Notice and acknowledgment of receipt of summons & complaint on deft. Harry G. Carpenter on 4-9-86, fld.
5-13-86	11	Notice of motion by defts. Development Industrial Corporation and DIC (Holding) Inc. to dismiss complaint, ret. 6-9-86 and proof of service, fld. (Brief submitted)
5-13-86	12	Notice of motion by deft. W.S. Kirkpatrick & Co. Inc. to dismiss complaint, ret. 6-9-86 and proof of service, fld. (Brief submitted)
5-15-86	13	Protective order re confidentially of certain documents, etc., fld. (Hedges) N/M
5-16-86	14	Order directing Rhonda Orin, Esq. to supply to counsel for pltf by May 16, 1986 address of deft. IDC International S.A. Luxembourg for service of process in the United States, etc., fld. 5-15-86. (Hedges) N/M
5-19-86	15	Notice of appearance on behalf of plaintiff, fld.
5-22-86	16	Order re confidentially of certain information, etc., fld. (Hedges) N/M
6-2-86	17	Order admitting Thomas H. Sear and Rhonda D. Orin pro hac vice on behalf of defts. W.S. Kirkpatrick & Co., Inc. Development Industrial Corporation and DIC (Holding) Inc., scheduling a status conference on July 18, 1986 at 9:00 A.M., etc., fld. 5-30-86 (Hedges) N/M

6-3-86	18	Notice of motion by attorney for deft. Harry G. Carpenter to join in motion of deft. W.S. Kirkpatrick & Co., Inc. for an order dismissing the complaint, ret. 6-9-86 and proof of service, fld. (Brief previously submitted)
6-6-86	19	Certification of Rhonda D. Orin, fld.
6-6-86	20	Certification of Thomas H. Sear, fld.
6-10-86	21	Order re discovery; directing deposition of deft. Harry G. Carpenter to be completee by June 30, 1986; defts' pending motions to dismiss shall be ret. Aug. 5, 1986, etc., fld. (Hedges) N/M
7-9-86	22	Order cancelling deposition of Robert H. Edwards for 7-3-86 & re-scheduling it for 7-10-86; vacating paragraph 2 of this Court's Order of 6-10-86; directing pltf. to file an amended complt., etc., fld 7-7-86. (Hedges) N/M.
7-16-86	-	Order re-assigning case from Judge Stern to Judge Lechner, filed. (Fisher) (See Civil 80-187)
7-18-86	23	AMENDED COMPLT, fld. 7-14-86.***
7-18-86		Summons on amended complt. as to defts., W.S. Kirkpatrick Inc., Development Int'l Corp., Int'l Dev. Corp., Harry G. Carpenter & Benson "Tunde" Akindele, issued. (10 days)
7-18-86		Summons on amended complt. as to defts., John M. Krankel, Emro Engineering Co. Inc., Robert W. Ruppert, & R.H. Edwards, issued. (20 days)

7-18-86		Summons on amended complt. as to deft., Ross E. Saxon, issued. (35 days)
7-21-86	24	Letter-Order & Opinion re deponent Carpenter shall not be compelled to testify, etc., fld. 7-17-86 (Hedges) n/m
7-22-86	25	Notice of motion of pltf., for an order unsealing the amended complt etc., ret. 8-5-86 & cert. of service, fld. 7-21-86 (brief sub)
7-28-86	26	Notice of motion of pltf. to appeal the Order of Mag. Hedges of 7-16-86, overruling deft.., Carpenter's claim of Fifth Amendment priviledge ret.8-25-86 & cert. of service, fld. 7-25-86. (Brief sub.)
7-30-86	27	Court's Order placing the Amended Complt. under seal, fld. 7-28-86. (Lechner) n/m
8-7-86	28	Letter-Order and opinion granting ptfs. motion to unseal amended complaint fld 8-6-86. (Hedges) N/M
8-27-86		At call for hearing on pltf's motion to unseal the amended complaint Court indicated motion to be decided pursuant to Rule 78. (Hedges) (3-5-86)
9-15-86	29	Notice of motion by pltf. to appeal Mag's order of 5-30-86 ret. 10-14-86 & cert. of service fld. 9-11-86. (brief sub.)
9-15-86	30	Notice of motion by pltf. to extend time for appeal of Mag's order of 5-30-86 ret. 10-14-86 & cert. of service fld. 9-11-86. (brief sub.)

9-22-86	31	Letter-request of pltf. for service of summons and amended complt. of deft. International Development Corp., filed 9-19-86.
9-22-86	32	Original summons on amended complt., issued as to International Development Corp., with registry receipts thereon, filed.
9-26-86	33	Motion of deft. John M. Krankel to join in motion of co-defts. for dismissal of amended complt., and proof of service, fld.
10-1-86	34	Notice of motion of deft. W.S. Kirpatrick & Co. International to join in motion of deft. W.S. Kirkpatrick & Co. for dismissal of the complt., ret. 10-27-86, silb and proof ofservice, filed.
10-6-86	35	Notice of motion of deft. John M. Krankel for dismissal of the amended complt., ret. 10-27-86 and proof of service, fld 10-2- (silb)
10-8-86	36	Reply of pltf. to deft. W.S. Kirkpatrick & Co. International's motion to dismiss complt., filed 10-7-86.
10-20-86	37	Reply of pltf. to deft. John M. Krandel's motion to dismiss amended complt., filed 10-15-86.
10-21-86	38	Notice and acknowledgment of service of copies of summons and complt on deft. John M. Krankel on 10-6-86, fld 10-17-86.
10-22-86	39	Reply of pltf. to motion for dismissal, filed 10-20-86.

10-22-86	40	Letter of deft. Nautilus Environmental Ststems, Inc. re receipt of copies of summons and amended complt., filed 10-20-86.
10-29-86		At call for hearing on motion of deft. W.S. Kirpatrick & Co., International to join in motion of deft. W.S. Kirkpatrick & Co. for dismissal of complt. Court indicated motion adjourned without date. (Lechner) 10-27-86.
10-29-86		At call for hearing on motion of deft. W.S. Kirkpatrick & Co. International to join in motion of deft. W.S. Kirkpatrick & Co. for dismissal of the complt. Court indicated motion to be adjourned without date. (Lechner) 10-27-86.
10-29-86		At call for hearing on motion of deft. John M. Krankel for dismissal of the amended complt., Court indicated motion adjourned without date. (Lechner) 10-27-86.
11-5-86	41	Letter of pltf. requesting an alias summons be issued as to deft. International Development Corp., S.A., filed 10-3-86.
11-5-86	42	Original alias summons as to deft. International Development Corp. with registry receipts thereon, filed.
11-19-86	43	Notice of motion and motion on behalf of the U.S. Dept. of Justice & Dept. of Justice Atty.Steven Levy to quash the Subpoena duces tecum issued on 9-18-86 ret. 12-8-86 & cert. of service, fld. 11-13-86. (Brief sub.

11-19-86	44	Affidavit of Steven M. Levy, fld. 11-13-86.
12-9-86	45	Affidavit of Alan Turner, filed.
1215-86	46	Certificate of service of brief in opposition to motion to quash subpoena, filed.
1-7-87	47	Affidavit of Rhonda D. Orin, fld 1-5-87.
1-20-87	-	Hearing on pltf's motion to quash subpoena. Ordered motion denied. Order to be submitted. (Lechner) 1-12-87.
1-27-87	48	Order granting motion of U.S.A. to quash subpoena, etc., except as is otherwise set forth herein, filed 1-20-87. (Hedges) n/m
1-27-87	49	Notice of motion of pltf. to appeal order entered on 1-20-87, ret. 1-26-87 and proof of service, filed 1-22-87.
1-27-87	50	Pltf's request for issuance of alias summons on deft. Ross E. Saxon, with affidavit thereto, filed 1-23-87.
1-28-87	-	Alias summons issued on deft. Ross Saxon, c/o Nautilus Enviromedical Systems, Inc. (35 days)
2-3-87	51	Summons returned unexecuted as to deft. Ross E. Saxon on amended complt., filed 2-2-87.

2-17-87	52	Notice and acknowledgment of service of copies of summons and complt. on defts. Emro Engineering Co., and Robert W. Ruppert, on 2-9-87, filed 2-11-87.
2-17-87	53	Motion and Clerk's order for special appointment to serve process of alias summons and amended complt., filed 2-11-87.
2-26-87	54	Transcript of hearing taken on 1-12-87, fld 2-25-87.
2-27-87	55	Notice of appearnce on behalf of deft. R.H. Edwards, filed 2-26-87.
3-18-87	56	Copy of summons returned serve on deft. Ross E. Saxon on 3-5-87, fld 3-12-87.
3-18-87	57	Transcript of hearing taken on 3-6-87, fld.
3-19-87	-	Hearing on defts. DIC and DIC Holding Inc. to dismiss complt. Ordered motion denied. Hearing on motion by attorney for deft. Harry G. Carpenter to join in motion of deft. W.S. Kirkpatrick & Co. Inc. for an order dismissing the complt. Ordered motion granted as to Harry G. Carpenter to join in motion but denied as to order dismissing the complt., Hearing on motion of pltf. to appeal the order of Mag. Hedges of 7-16-86 overruling deft. Carpenter's claim of Fifth Amendment previledge. Decision reserved. Hearing on motion by pltf. to appeal

		Mag's order of 5-30-86. Ordered motion denied. Hearing on motion of deft. John M. Krankel to join in motion of co-defts. for dismissal of amended complt. Ordered motion granted as to John M Krankel joining in motion but denied as to dismissal of amended complt., Hearing on motion on behalf of the US Dept. of Justice & Dept. of Justice Attorney Steven Levy to quash the Subpoena duces tecum issued on 9-18-86. Decision reserved. Hearing on motion of pltf. to appeal order entered on 1-20-87. Ordered motion denied. (Lechner) 3-6-87.
3-20-87	58	Transcript of hearing taken on 3-6-87, fld 3-19-87.
5-5-87	59	OPINION, fld. 5-1-87. (Lechner) (copy to NJLJ)
5-5-87	60	Order granting motion of defts., W.S. Kirkpatrick & Co., Inc., Development Int'l Corp., DIC(Holding) Inc., W.S. Kirkpatrick & Co., Int'l, Harry G. Carpenter, John M. Krankel & R.H. Edwards to dism. and dism. cts. One, Two, Three, Four, Five, Six and Seven of the complt., fld. 5-1-87. (Ldchner) n/m
5-21-87	61	Notice of appeal of pltf., fld 5-15-87 @ 1:00 P.M.

5 1-87	-	Copies of notice of appeal sent to USCA, Rutter, Turne & Stein Esqs Clapp & Eisenberg, Esqs., Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan & Meanor, Esqs., Silis, Beck, Cummins, Zuckerman Radin, Tischman & Epstein, Esqs., Dominic F. Amorosa, Esqs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CRIMINAL NO. 85-353
	)	
HARRY CARPENTER,	)	
	)	
Defendant.	)	
	)	

INFORMATION

The United States Attorney Charges:

Count One

On or about December 21, 1982, in the District of Newark, defendant Harry Carpenter, an officer and Chairman of the Board of Directors of W.S. Kirkpatrick, Inc., a domestic concern, caused the use of a means and instrumentality of interstate commerce, that is, a Western Union international telex to order Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Bank of Commerce and Credit International in Luxembourg corruptly in furtherance of an Offer, payment, promise to pay and authorization of the payment of money to:

(a) a person, that is Benson "Tunde" Akindele through two companies, Deriks and Los, Panamanian bearer share corporations, while having reason to know that a portion

of such money would be offered, given, or promised, directly or indirectly to foreign officials, Nigerian Air Force officers, the Party of Nigeria, the Minister of Nigeria and other government defense personnel for the purpose of influencing the acts and decisions of such foreign officials and others in their official capacity and inducing them to use their influence within the Government of Nigeria in order to obtain a contract for flight training equipment for W.S. Kirkpatrick, Inc.

All in violation of Title 15, United States Code, Section 78dd-2.

Respectfully submitted,

Thomas W. Greelish
United States Attorney

Steven M. Levy
Fraud Section
U.S. Department of Justice

Laurence R. Maddock
Chief, Fraud Division
United States Attorney's Office

Attorneys for the Plaintiff
United States of America

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
HARRY CARPENTER,	)
	)
Defendant.	)

CRIMINAL NO. 85-353

OFFER OF PROOF

The United States of America and defendant Harry G. Carpenter hereby agree that, if a trial were held in this case, the evidence would show that:

Defendant, Harry G. Carpenter, went to work for the W.S. Kirkpatrick & Co., Inc. (hereinafter "Kirkpatrick") in 1954. Kirkpatrick is a New Jersey Corporation that sells equipment to foreign airlines and airports. He and his wife eventually became majority shareholder in Kirkpatrick, Chairman of the Board of Directors and Chief Executive Officer.

On January 3, 1978, defendant Carpenter and his wife sold their interest in W.S. Kirkpatrick to Development Industrial Corporation, As a condition of the sale, Carpenter agreed to remain as Chairman of the Board of Kirkpatrick and Chief Executive Officer of the Company for five years. He completed his employment contract in January 1983, but remained employed by the company as a consultant while his successor assumed the Chairman's responsibilities, In June 1983, Carpenter left the employment of Kirkpatrick.

While Carpenter was still employed at Kirkpatrick, he learned of an opportunity for Kirkpatrick to sell Aero medical equipment consisting of ejection-seat trainers, disorientation simulators and other devices to the Nigerian Air Force for a Aero Medical Center in Kaduna Air Force Base in Nigeria. Carpenter believed that Kirkpatrick needed an agent in Nigeria to assist in negotiating and obtaining the contract.

On the recommendation of two British businessmen, Carpenter contacted a London solicitor, who in turn put him in touch with Benson "Tunde" Akindele, ("Akindele") a Nigerian national.

Akindele offered to assist Kirkpatrick by serving as its local agent in Nigeria. Carpenter negotiated an agreement with Akindele which provided that Kirkpatrick would pay a commission equal to twenty percent of the contracted price of the Aero medical equipment to "Deriks" and "Los", two Panamanian bearer share corporations, which were set up, and controlled, by Akindele to receive the payments from Kirkpatrick.

Contracts between Deriks and Los and Kirkpatrick were signed in May 1981. Kirkpatrick then increased its bid price to the Government of Nigeria to include the twenty percent to be paid to Akindele. Akindele began to assist Carpenter and Kirkpatrick in negotiating with various Nigerian officials.

In September, 1981, Akindele advised Carpenter that the twenty percent commission that Akindele would receive on the Aero medical contract from Kirkpatrick would be paid to himself and various Nigerian political and military figures as follows:

2 1/2%	-	for Akindele.
5%	-	for Air Force.
2 1/2%	-	for medical group.
5%	-	for the Party.
2 1/2%	-	for the minister himself.
2 1/2%	-	other key defense personnel.

The understanding Akindele communicated to Carpenter was that the payments were to be made to the above-cited political and military figures in Nigeria in order for W.S. Kirkpatrick to obtain the 10.8 million dollar Aero medical contract from the Government of Nigeria.

On March 19, 1982, the Government of Nigeria signed a contract awarding the construction of the aero-medical facility to Kirkpatrick. The contract was for 10.8 million dollars. However, the down payment on the contract from Nigeria was not paid until September 1982, and the letter of credit form the Central Bank fo Nigeria was not opened until November 1982.

Thereafter, Kirkpatrick paid 20 percent of the price which it received for performance of the Nigerian contract to Akindele through Deriks and Los.

The payments were made as follows:

	Date	Payee	Amount
1.	9-30-82	Deriks	$117,929.34
		Los	193,657.70
2.	12-21-82	Deriks	290,486.50
		Los	290,486.50
3.	2-02-83	Deriks	145,243.27
		Los	145,243.27
4.	8-08-83	Deriks	290,486.50
		Los	290,486.50

The payment charged in the information is the second payment. The second payment to Deriks and Los occurred on December 21, 1982, when, as a result of having entered into the agreement with Deriks and Los, Carpenter caused Kirkpatrick to send a Western Union international telex from Fairfield, New Jersey to New York City, New York ordering the Standard Chartered Bank of New York to pay $580,973.00

to the Bank of New York for the account of Deriks and Los at the Bank of Commerce and Credit International in Luxembourg.

Attorney for Harry Carpenter:

HAMILTON P. FOX, III

Attorneys for the United States:

THOMAS GREELISH
UNITED STATES ATTORNEY

Steven M. Levy
Fraud Section
U.S. Department of Justice

Agreed to:

HARRY CARPENTER

Laurence R. Maddock
Chief, Fraud Section
United States Attorney's Office

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY G. CARPENTER,

Defendant.

: Criminal Action

: No. 85-353

: Sentence

Trenton, New Jersey
November 18, 1985

BEFORE: The Honorable JOSEPH H. RODRIGUEZ, U.S.D.J.

APPEARANCES:

STEVEN M. LEVY, ESQUIRE
United States Department of Justice
For the Plaintiff

HAMILTON P. FOX, ESQUIRE
and
THEODORE WELLS, ESQUIRE
For the Defendant

CARL NAMI, JR., CSR, CP
Official Court Reporter
United States District Court
402 East State Street
Trenton, New Jersey 08605

THE COURT: The first matter that we have is the sentencing in the matter of *United States v. Harry G. Carpenter*.

MR. FOX: Good afternoon, your Honor. My name is Hamilton Fox. I'd like to address the Court briefly with respect to the issue of the sentence, and Mr. Wells would also like to address the Court briefly.

Before that, there are two forms in connection with the presentence report which we've executed, and we're handing you, indicating that Mr. Carpenter has read and understands them and understands the report.

(Pause.)

THE COURT: All right.

MR. FOX: Your Honor, there are, as you, I believe, have the form that indicates two minor errors in the report, we believe.

One is the suggestion that this is the first time that anybody has ever been prosecuted under this statute. That is not the case.

The second one is, I believe, is the analogy on page 8. I misspoke. I don't mean analogy on page 8, but the information on page 8 which relates to sentencing. I believe that that information relates to the sentences that have been imposed under Domestic Bribery statutes and not the sentences that have been imposed under the Foreign Corrupt Practices Act.

It is my understanding, and here I need to correct something that I've previously represented to the Court. It is my understanding that there have only been approximately a dozen individuals prosecuted under this statute, and that of that dozen, I previously indicated none, but I've been told by Mr. Levy today that one individual has been sentenced to

incarceration. So, the statistics that are set forth on page 8 of the presentence report clearly relate to some other statute.

There are just one or two brief points which I would like to make in this proceeding. We've set forth our position at length in a memoranda that we've already filed with the Court. But one of the points that I'd like to make, which really relates to the difference between the Domestic Bribery and Extortion statutes which those figures on page 8 relate, and the situation that presents itself to the Court today.

I was a prosecutor for some seven and a half years, and during that time I frequently heard the argument which is somewhat analogous to the argument that I have made today or made in the papers on behalf of Mr. Carpenter, which is that what the Court is faced with is not a situation where there's bribery, but a situation where there is in fact extortion. I was never sympathetic to that argument presented in the domestic content, and yet I do think it is a legitimate argument to make in pursuit of leniency in this case, and as I thought about it, it seemed to me that the difference between the situation that confronts the Court today and the situation that confronts the Court in a Domestic Bribery situation, that there are two differences.

The first is that an individual faced with a corrupt Government official of the United States is seeking a payoff in order to grant him some sort of concession of contract, has an alternative. He doesn't have to pay that money. He can go to the authorities, and if the local authorities are for some reason corrupt, he can go to the Department of Justice in the Federal Bureau of Investigation. An individual like Mr. Carpenter faced with a situation that he faced in Nigeria, doesn't have that luxury. There are no criminal authorities in the country of Nigeria who he can turn to. And, indeed, I think if you'll see in one of the articles which we attached to our sentencing memorandum, there's an indication that the Minister of Justice himself, after the coup that occurred at the end of 1983, was found to be involved in criminal activity.

The second difference I think between the domestic situation and the situation that confronted this individual was that the statute, the bribery statute that applies in a domestic situation, applies to everybody. It applies to all the competitors of the individual who may be tempted to make a payoff. That's not the situation in Nigeria or in other parts of the world where corruption is endemic. The statute applies only to American companies. That doesn't mean that American companies shouldn't follow the statute. But what it does is put them at a severe competitive disadvantage from their competitors in England, France, Germany and Japan and the rest of the world, where it is not a crime under those statutes to do what Mr. Carpenter did.

So, we suggest that those are things that the Court should take into consideration in sentencing this individual.

We also suggest that the Court should take into consideration the fact that Mr. Carpenter has never lied, never covered up, never tried to hide what his role has been in this situation. He came forward to the Government before he was ever even subpoenaed, before he was ever contacted for interview by the Government. He has fully cooperated with the Government. I believe the Court has received a letter from Mr. Levy which so indicates. This was not an easy thing for this man to do. He's a competitive individual. He's been a businessman all of his life. He believes in competition, he believes in fighting, and yet he was never, ever in a situation where he wanted to distort or lie or misrepresent what he has done. He has faced up to that. He has been candid about it, and he's come forward and cooperated fully.

Finally, there are the personal qualities of this individual, many of which we've set out at some length in our sentencing memorandum.

I have participated in a number of sentences, many on the other side of the courtroom. In many of those sentences there have been letters which have been filed on behalf of the individual. Those letters are always filed. I once attended a

sentencing conference where the wisdom of filing some such letter was discussed, and it was concluded that you'd better file them because the absence is going to be noted. Most of those letters that I have seen in other cases are letters which one judge refers to as "I love Lucy letters," the defendant is a terrific guy; please be nice to him.

The letters which have been submitted on behalf of Mr. Carpenter I think are qualitatively different than any I've ever encountered, because they set forth with specifics the examples of the kind of man that Harry Carpenter is and the kind of service that he's rendered to the state and to his country. And I would predict that during your Honor's tenure on the Bench, which I realize that has not heretofore been long, that you are unlikely to see letters of that quality in any other case. Indeed, I was struck particularly by the examples of community service that he has previously rendered to his community, examples which I certainly could not match up in my own career, and I doubt that many of us could live up to.

But finally, if I could make just two personal observations, having spent a lot of time with this man over the last year, those, the first good thing that I would like is something that is noted in a number of the letters that were submitted to your Honor, particularly the letter of Mrs. Carpenter, and that is the patriotism of this man. And I think what is so ironic or unfortunate or tragic or whatever the adjective is about that, is that Harry Carpenter finds himself in a situation where he has always believed it is the patriotic thing to do, not just to serve your country, but to participate in the international market aggressively to try to build a company that supplies jobs and helps the American economy. And yet—and he did that, and he overstepped the bounds of doing that, and we all concede that as we're standing here today, but he is a patriot, and it is ironic for him to stand and hear your Honor call the case of *United States v. Harry Carpenter*. That's a very, very difficult thing for this man to live with.

The second and final point that I want to make is that I have been struck during this year, this 14 months, which were

something that I think comes clearly through in the letters that have been written about this man, about his personal kindness and consideration for others. He has obviously been someone who has been under tremendous stress. But I think that I can speak for myself and Mr. Wells and everyone else who has had to deal with Harry Carpenter. He has always been considerate of others. He has always put the interest generally much more—must less serious than those of his own, ahead of his own. He's always been very kind and considerate to everyone. He's a man that I'm proud to call a friend, and I hope that that comes through to the Court in the letters and the materials that we've submitted on behalf of this man, and that the Court will exercise leniency in taking into consideration the characteristics of this man, the situation he found himself in which led to the violation of the statute, and finally, his cooperation with the Government.

Mr. Wells has a few points that he would like to add.

THE COURT: Thank you.

Mr. Wells?

MR. WELLS: Thank you.

Your Honor, in the sentencing memorandums submitted by Mr. Fox and myself, we urge the Court to impose a fine upon Mr. Carpenter in sentencing him for this violation.

I would like to address myself to why we feel a fine is the most appropriate sentence. The options that your Honor faces are as follows:

Your Honor could impose a sentence of incarceration. Your Honor could impose a sentence of probation. Your Honor could impose a fine or some combination of the three.

We suggest in the first instance that the imposition of a sentence of incarceration would be inappropriate in this case. We think, given Mr. Carpenter's character, his cooperation

with the Government, he stands before your Honor as a cooperative Government witness. And given the background of this case, that incarceration would be inappropriate.

We emphasize to your Honor the fact that in the history of this Act, only one individual has ever been incarcerated, and in that case, to our understanding, the Government took the position that incarceration should be imposed, but this is a far different case, your Honor. It is a case where the Government takes no position and where Mr. Carpenter is, as I have indicated, a cooperating Government witness. We suggest that the real question before your Honor is whether it is appropriate to impose the sentence of probation or alternatively, impose a fine.

In the only case, to my knowledge, in the District of New Jersey that is similar to Mr. Carpenter's, Judge Thompson imposed a sentence of a fine upon certain executives of the General Electric Corporation that were charged with an overseas bribery payment. And that case, which is reported as *United States v. Steel*, I had the opportunity to represent one of the GE executives. That case was initially tried before Judge Thompson. Convictions were obtained. The case was reversed in the United States Court of Appeals for the Third Circuit, and on remand, all defendants agreed to enter a plea of guilty. The corporation entered a plea of guilty and three individuals. Judge Thompson imposed the maximum fine on both the corporation and on each of the individuals. She did not impose any condition of probation.

I would suggest using that as a bench mark, that such a sentence, that is a sentence of solely a fine, is highly appropriate in this case. To impose a condition of probation, a sentence of probation upon Mr. Carpenter I suggest would be inappropriate, because the real reason, the real purpose for imposing probation is usually to make sure that when the person is returned to society or as the person continues in his or her job, that the Federal Government will have an opportunity to periodically survey the activities of that person,

and make sure that the person is not overstepping the lines again.

In Mr. Carpenter's case, however he has been charged with violating a Federal statute that purports to regulate conduct in the international business community. Mr. Carpenter is now retired. He's no longer part of the international business community. He spends his time now, and plans to spend his time in the future, helping his wife in their store and fixing up their house, and also in certain community activities. But he is out of the international business game. He's no longer part of that community. And no one has ever suggested that outside the international business community, Mr. Carpenter has ever had any type of troubles with the law. In fact, everything is to the contrary. He's been an exemplary citizen, and I urge that given the fact that he has taken himself out of that business community, that international business community, that to impose probation in this case would really not advance any goals. It would cause the Government, in fact, to expend, I would suggest, needless time. There's nothing to supervise in this case. He has taken himself out of the critical area.

I would argue, also, that to impose community service, although Mr. Carpenter would do anything your Honor asks in this area, would also be inappropriate. For the last month, Mr. Carpenter has basically lived in my office on a daily basis. He have attempted to put together appropriate letters for your Honor's consideration, and also we have spent a lot of time resigning from organizations. We've been on the phone apologizing to certain organizations that Mr. Carpenter has worked with for many years, saying that it was Mr. Carpenter's opinion that because of this circumstance, it would be inappropriate for him to continue to serve. Because if he were given probation, somebody might look up one day and point a finger and say, ha, you've got somebody on your board of directors who is on probation. And given this circumstance, to put him on probation, I suggest, would be contrary and against the public interest, because it puts him in a situation where he can't go back to work for the various community organizations that he has worked with for so long.

I would argue that given these facts, the most appropriate sentence would be the imposition of a fine, even if it be the maximum fine. But to put him in a position where he can get this matter behind him, where he can get this matter behind him and return to the community to continue the type of public service that he has given freely so much of in the years past, and I suggest that probation won't help anyone. In fact, it will hinder his ability to continue to serve the community that he has served so well throughout the years.

Thank you.

THE COURT: Thank you, Mr. Wells.
Mr. Carpenter, is there anything you wish to say?

THE DEFENDANT: Your Honor, I have nothing much that I can add to the words of my attorneys and the letters written. These past 14 months have obviously been very painful, and I wanted to express to you how very sorry I feel about this entire situation.

THE COURT: All right, I can appreciate your feeling, Mr. Carpenter, and I have had over the past several days the occasion to read the many letters and correspondence that were directed to me prior to sentencing in this matter. And they are, very frankly, extremely favorable with respect to the activities of Mr. Carpenter in the past. And today sentencing comes, again, at a very strange time, when we speak about the citizenship, just having finished a ceremony of naturalization where we tell everyone, the citizens, their rights and responsibilities as citizens of the United States, which they took freely. I think what gives me the greatest amount of concern in this case is that the magnitude of what is occurring as a result of bribes in Nigeria is incomprehensible when one sees what is referred to as the Garden of Graft, and I think the 60 Minute segment that was left at my home this weekend so that I could view, and which I did last evening, and I understand it was by consent of all the parties, that it makes a -- doesn't make a plea, it makes an exposition, I think, of something that almost unspeakable when elected officials are

able to exact, almost by way of extortion, large amounts of money while they ride through their subjects that are practically starving to death. And, of course, if it were someone who had acquired some of that wealth, who gains accruing to them as a result of that activity, it's one that the full force of the law, I think, would have to demand that justice be done.

What also impresses me here is that the United States has seen fit to pass an act that deals with corruption of foreign officials, and I think we all understand what that means and what the mandates of Congress are with respect to that law, that perhaps acknowledges what's going on overseas and demands that at least with respect to the businesses here, that it not engage in that activity. It is different than domestic bribery. Domestic bribery does have the full force of the law that can reach that corrupt official, as we have seen the poast, that it does in fact work, and it is a way out for someone who feels that they're being extorted in order to receive a contract from the Government. It's not easy, but I think in fairness, we have to recognize that that in fact is occurring, and it occurs many times at a disadvantage of the businessmen of the United States, although it's certainly no defense and no excuse, because in some way it does continue that process.

But what I'm forced to do is to look at this case and determine whether Mr. Carpenter, as he stands here, should receive the full force of that law that's been passed and mandated by Congress. I think there is a certain amount of discretion that the Court has. I am impressed by the letter that I received from Mrs. Carpenter, and it's not easy for me to read a lot of the words that indicate a man who has been serving his country and has been serving his community, and even to the extent that I see from the alleged article, that he was in The Jerseyan of the week or the month, or whatever that time frame was. So, I do someone standing before me that's had no prior record and who has, according to the Department of Justice, been cooperating completely with Federal law-enforcement authorities as a result of what has occurred, and according to them, that that cooperation has been beneficial, in the hope of stamping out this kind of activity in the future.

Mr. Carpenter apparently, from the presentence report, has not had a prior involvement with the law with respect to activities which would require the law to be involved, as far as crimes are concerned. So, it's a man with a record, that except for this occurrence, would be exemplary in every way. However, the Court does have to acknowledge that what occurred is not proper, and that what occurred does require a certain amount of reaction in the sense that society has to know that at least from this point forward or into the future, that this type of activity cannot be condoned. But taking everything into consideration, as I say, it's not an easy matter when you review the entire record that's before me, to suggest that simply a fine would be sufficient.

I think that to the extent that there is something as a result of what occurs, that some degree of service to the community of course, should also be required.

Taking everything into consideration, my sentence is as follows:

It is adjudged that the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of three years upon the following terms and conditions. That he pay a fine in the sum of $10,000 in such amounts per month as determined by the Probation Department, and that he perform 200 hours of community service under the direction of the Probation Department. Special assessment provisions are not applicable in this case.

Now, I think in doing that, I struggled a great deal with the effect of the words sentence is hereby suspended and what probation means. But I think I'm attempting to exercise that discretion in reviewing the entire file. And knowing that there's a man before me who, that jail would seem inappropriate for the purpose that it would serve, and especially when one views that what we're dealing with here is not a domestic situation, but a foreign situation that's well-known throughout the world as a Garden of Graft. Perhaps there's some mechanism of reaching that graft and making sure

that the people that are subjected to it and its oppressive activity, someday receive some form of justice.

With respect to this Court, I think justice is served with probation for a period of three years, the imposition of a fine and community service.

MR. WELLS: Than you, your Honor.

MR. FOX: Thank you, your Honor.

THE COURT: Thank you.

MR. LEVY: Thank you, your Honor.

(This matter was then concluded.)

* * *

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
W.S. KIRKPATRICK, INC.	)
	)
Defendant.	)

CRIMINAL NO. 85-415 JHR

Title 15, United States Code,
Section 78dd-F[ ]

INFORMATION

The United States Attorney Charges:

Count One

On or about December 21, 1982, in the District of Newark, defendant, W.S. Kirkpatrick, Inc., a domestic concern, used a means and instrumentality of interstate commerce, that is, a Western Union international telex from Fairfield, New Jersey, to New York, New York, to order Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Bank of Commerce and Credit International in Luxembourg corruptly in furtherance of an Offer, payment, promise to pay and authorization of the payment of money to:

> (a) a person, that is Benson "Tunde" Akindele through two companies, Deriks and Los, Panamanian bearer share corporations, while having reason to belive that a portion of such money would

be offered, given, or promised, directly or indirectly to foreign officials, Nigerian Air Force officers, the Party of Nigeria, the Minister of Nigeria and other government defense personnel for the purpose of influencing the acts and decisions of such foreign officials and others in their official capacity and inducing them to use their influence within the Government of Nigeria in order to obtain a contract for flight training equipment for W.S. Kirkpatrick, Inc.

All in violation of Title 15, United States Code, Section 78dd-2.

Respectfully submitted,

Thomas W. Greelish
United States Attorney

Steven M. Levy
Fraud Section
U.S. Department of Justice

Laurence R. Maddock
Chief, Fraud Division
United States Attorney's Office

Attorneys for the Plaintiff
United States of America

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
W.S. KIRKPATRICK, INC.	)
	)
Defendant.	)

CRIMINAL NO. 85-415

OFFER OF PROOF

The United States of America and defendant W.S. Kirkpatrick, hereby agree that, if a trial were held in this case, the evidence would show that:

Defendant W.S. Kirkpatrick (hereinafter "Kirkpatrick") is a New Jersey Corporation whose principal business is the sale of aircraft related equipment.

In 1981, Harry G. Carpenter, who was at that time Chairman of the Board and Chief Executive Officer of Kirkpatrick, learned of an opportunity for Kirkpatrick to sell aero medical equipment consisting of ejection-seat trainers, disorientation simulators and other devices to the Nigerian Air Force for an Aero Medical Center in Kaduna Air Force Base in Nigeria. Carpenter believed that Kirkpatrick needed an agent in Nigeria to assist in negotiating and obtaining the contract.

On the recommendation of two British businessmen, Carpenter contacted a London solicitor, who in turn put him in touch with Benson "Tunde" Akindele ("Akindele"), a Nigerian national.

Akindele offered to assist Kirkpatrick by serving as its local agent in Nigeria. Carpenter negotiated an agreement with Akindele which provided that Kirkpatrick would pay a commission equal to twenty percent of the contracted price of the Aero medical equipment to "Deriks" and "Los" , two Panamanian bearer share corporations, which were set up, and controlled, by Akindele to receive the payments from Kirkpatrick.

Contracts between Deriks and Los and Kirkpatrick were signed in May 1981. Kirkpatrick then increased its bid price to the Government of Nigeria to include the twenty percent to be paid to Akindele. Akindele began to assist Carpenter and Kirkpatrick in negotiating with various Nigerian officials.

In September, 1981, Akindele advised Carpenter that the twenty percent commission that Akindele would receive on the Aero medical contract from Kirkpatrick would be paid to himself and various Nigerian political and military figures as follows:

2 1/2%	-	for Akindele.
5%	-	for Air Force.
2 1/2%	-	for medical group.
5%	-	for the Party.
2 1/2%	-	for the minister himself.
2 1/2%	-	other key defense personnel.

The understanding Akindele communicated to Carpenter was that the payments were to be made to the above-cited political and military figures in Nigeria in order for W.S. Kirkpatrick to obtain the 10.8 million dollar Aero medical contract from the Government of Nigeria.

On May 19, 1982, the Government of Nigeria signed a contract awarding the construction of the aero-medical facility to Kirkpatrick. The contract was for 10.8 million dollars. However, the down payment on the contract from Nigeria was not paid until September 1982, and the letter of credit from the Central Bank of Nigeria was not opened until November 1982.

Thereafter, Kirkpatrick paid 20 percent of the price which it received for performance of the Nigerian contract to Akindele through Deriks and Los.

The payments were made as follows:

	Date	Payee	Amount
1.	9-30-82	Deriks	$117,929.34
		Los	193,657.70
2.	12-21-82	Deriks	290,486.50
		Los	290,486.50
3.	2-02-83	Deriks	145,243.27
		Los	145,243.27
4.	8-08-83	Deriks	290,486.50
		Los	290,486.50

The payment charged in the information is the second payment. The second payment to Deriks and Los occurred on December 21, 1982, when, as a result of having entered into the agreement with Deriks and Los, Kirkpatrick caused to be sent a Western Union international telex from Fairfield, New Jersey to New York City, New York ordering the Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Deriks and Los at the Bank of Commerce and Credit International in Luxembourg.

Attorney for W.S. Kirkpatrick, Inc.:

THOMAS H. SEAR

Attorneys for the United States:

THOMAS GREELISH
UNITED STATES ATTORNEY

Steven M. Levy
Fraud Section
U.S. Department of Justice

Laurence R. Maddock
Chief, Fraud Section
United States Attorney's Office

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 85-415

UNITED STATES OF AMERICA, :

v. :

Sentencing

W.S. KIRKPATRICK & CO., INC., :

:

Defendant.

January 6, 1986
Trenton, New Jersey

BEFORE:

THE HONORABLE JOSEPH RODRIGUEZ, U.S.D.J.

APPEARANCES:

THOMAS W. GREELISH, U.S. ATTORNEY
FOR THE DISTRICT OF NEW JERSEY,
BY: STEVEN LEVY, A.U.S.A.,
For the Government.

SPENGLER, CARLSON, GUBAR, BRODSKY & FRISCHLING
BY: THOMAS H. SEAR, ESQ. (N.Y. Bar)
For the Defendant.

THE COURT: All right. We are here this afternoon for the court schedule of the sentencing of W.S. Kirkpatrick & Company. Are you ready?

MR. LEVY: Yes, your Honor, the United States is ready.

MR. SEAR: Yes.

THE COURT: May we have your appearances for the record?

MR. LEVY: For the United States, your Honor, my name is Steve Levy, L-e-v-y.

MR. SEAR: Your Honor, my name is Thomas H. Sear, and my associate here is Miss Rhonda Horn and Mr. Larry Horn, also has been involved in this matter, and as your Honor will recall, introduced me to the Court last time, I believe.

THE COURT: Yes.

THE COURT: Mr. Sear, do you want to proceed?

MR SEAR: Yes, your Honor.

I will attempt to be brief. I have made that promise in the past and not carried it through on, but I think I can do a better job of that this afternoon because we have attempted to put, to the best of our ability, all the information that we thought was relevant and necessary before the Court in our presentence memo.

And the two reasons for my standing up right now are, number one, if your Honor has any questions about any of the matters that we put forward or any other aspect of the case, I will be happy to respond to an inquiry by your Honor. And secondly, I just wanted to emphasize certain of the critical points that we think counsel for a lenient, fair, reasonable, merciful sentence in this matter.

And I suppose it seems a little bit strange talking about being merciful when you are dealing with a corporation which is a nonhuman entity, but I would suggest to your Honor that the real sentence that is going to take place here this afternoon is of the individuals, the people who are with W.S. Kirkpatrick & Company, Inc.

As we have indicated, since 1984, the status and the critical difficulties of the corporation have resulted in some 28 jobs being eliminated, but at present there are 28 individuals from the present chief executive on down who are attempting to turn this situation around, put this very tragic and troubling matter behind them, and in viewing them, I think it is absolutely critical that everyone understand that these individuals did not participate in what went on here. They didn't benefit from it. Indeed, the shareholders of this corporation have not taken any dividends or distributions in connections with this.

Besides the fact that the individuals who are at the corporation now were not involved in this matter, it was taken, the crime was really committed by an individual who not only is not there any more, but who was acting in complete contravention of the well-established clear policy of the corporation.

In addition, I know your Honor, in sentencing Mr. Carpenter, took into account all the facts and circumstances, including the nature of the offense here. Well, I don't, while I don't mean to excuse the conduct, I think we have all reviewed the facts in such manner and detail as to fairly indicate that we are not dealing with conduct that is as culpable as is involved in a number of other crimes.

I also want to make a very basic point that I think the Court ought to take into consideration, the extraordinary cooperation of the corporation here. I have been involved in law enforcement both as a prosecutor and as a private counsel for, I don't know, ten or eleven years, and I can't remember, at least and I don't think I was ever involved in a situation which an entity or a person took such a principled, responsible position.

In this case, when the company discovered the documents and it indicated a crime has been committed, not only did they produce them to the Government, but they isolated them out and specifically directed the Government's attention to those documents. I think it is fair to say that that act by the company resulted in Mr. Carpenter's determination to cooperate with the Government. Up until that point he had, as I understand it, completely professed his innocence. He certainly had done so to the company.

And I think that not only is important in terms of saying, well, the company cooperated, but it is concrete evidence of the fact that we have responsible, law-abiding people who are in control and who are running this company now, and who in a very difficult situation are trying to save the jobs of a bunch of people and go forward and conduct their business.

In that regard, I would finally say that any fine for this corporation would be a substantial one, under the financial situation and status of this company. A large fine will almost certainly put the company out of business, because given the numbers, given the performance, given the obligations of this company already, it makes absolutely no sense for it to continue if on top of the staggering losses and the incredible deficit, negative net worth that it now has, if a large fine is imposed on top of it, a large fine I might add, I can't see how the corporation could pay.

But those are the points that I wish to emphasize. I thank you for your time, your Honor, and again I reiterate if now we are, after Mr. Levy speaks, you have any questions, I would be happy to respond to you.

THE COURT: Thank you, Mr. Sears. Mr. Levy.

MR. LEVY: Thank you, your Honor.

Your Honor, let me preface my remarks by saying that I think that the Government, as well as the corporation, is very interested in seeing that the Court metes out a sentence which is

fair. I hadn't intended to really address the Court today, but I did receive a sentencing memo from Mr. Sear the other day which raises certain points that I believe need to be addressed. One of those points in the memo is that Harry carpenter acted alone.

Your Honor, the Government's investigation has revealed facts that are directly to the contrary of that position. The Government has evidence that Mr. Carpenter did not act alone, that Mr. Carpenter did act with the, he did act with the senior officers of the corporation; he did act the president; he did act with the vice president in charge of finance in bribing these Nigerian officials or in violating the Foreign Practices Act, which is the count which is charged in the information before the Court.

I can name the individuals for the Court if you would like, but the individuals, the president of the company, the vice president in charge of finance are both named in some -- in the documents to which Mr. Sear referred, the interoffice company memoranda that were written by Harry Carpenter, discussed with them, given to them.

So I think it is pretty clear to the Government, your Honor, that Mr. Carpenter was not acting alone. He was acting in conjunction with the senior officers of the corporation. Mr. Carpenter was chairman of the board of directors, acting for the board of directors, so we feel that that contention that has been raised by the defendant that Mr. Carpenter was acting alone is not grounded in fact.

I might also say that there is some evidence from Mr. Carpenter that an official of the corporation which owns W.S. Kirkpatrick was involved intimately with the payment of this -- this improper payment to this Nigerian national which is charged in the information. I can also name this individual for the Court. And I might say to the Court that this individual is not a United States national, he is a Syrian national, I believe. We have invited him to appear before the Grand Jury. We have attempted to elicit the cooperation of Mr. Sear in getting

him here, and I think that Mr. Sear has done all he can, but however, this individual has indicated that he is not going to appear without I think a grant of immunity which the Government is not going to give.

The next point that I would like to address, your Honor, is that there were no other instances by W.S. Kirkpatrick, violations of the Foreign Corrupt Practices Act. The Government is also in possession of the fact there was another violation of that Act, the Foreign Corrupt Corporations Act by the corporation, and this is outside the statute of limitations, so therefore the Government has not elected to proceed on it.

Another point I would like to address is that no competitors of W.S. Kirkpatrick were excluded from bidding on the Nigerian contract. Your Honor, the Government is in possession of evidence which indicates that this is false, because William Mitchell , who is the president of Environmental Techtonics Corporation, a Pennsylvania corporation, was quire interested in bidding on this Nigerian contract. Mr. Carpenter, as well as others at W. S. Kirkpatrick were aware of this, and it appears from the evidence that we have that in fact Mr. Mitchell was excluded from bidding on this contract because of the improper conduct by Mr. Carpenter, the corporation and other senior officers at the corporation.

There was also made mention in Mr. Sears sentencing memorandum of no evidence of payment being actually made to these foreign officials. I should tell the Court, your Honor, that the Government has been for the last three-quarters of a year attempting to obtain the permission of the Government of Luxembourg , in order to penetrate their bank secrecy laws, in order to get the necessary documents from the banks in Luxembourg .

The State Department has been helping with this, and as I understand it, that information may soon be forthcoming in this year. So it is not a question of the evidence not existing, it is just a matter of following the protocols with the Government of

Luxembourg and with the State Department in order for them to give us something which they ordinarily would not do.

The next thing I would like to say about this case, your Honor, is that there has been made mention of the fact that no present employees of the company are accountable for the situation at hand. I would agree with that except for the fact that one of the individuals who is now in a very prominent position is still at the corporation. This individual is current, has been sent the target letter by the Department of Justice advising him that he is a target of a Grand Jury investigation, that the Government is contemplating indictment. And so I would say to the Court that except for this one individual, Mr. Sear's statement is true, there are no employees here who were responsible for, but this individual who directly authorized the payments to this Nigerian note in violation of the Foreign Corrupt Practices Act, your Honor, is still there.

Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated. In reading Mr. Sear's sentencing memorandum, your Honor, I got the impression that Foreign Corrupt Practices Act is somehow not effective or maybe somehow not needed, but I can say that the government of Nigeria as well as the State Department have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain evidence about who possibly received the payments which are set forth in the memoranda that Mr. Carpenter wrote to other senior officers of the corporation.

I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State department has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.

This is not a case where there is not a victim. Shagari, who is the president of Nigeria at the time of this contract is now under house arrest. Some of these other individuals and I can name them if the Court is interested, are a very prominent military figures who are still in power in Nigeria . The Nigerian government would certainly like to have their names, and I think the reason for the enactment of the Foreign corrupt Practices Act is in part because of the devastating political impact that payments on corruption has, and I think that is present in this case as well, on the Government.

The Government is interested in, without calling for a specific figure, the Government is interested in a fine that would send a clear signal to the business community, in New Jersey and else where, that the Foreign Corrupt Practices Act is important and that the purposes which led to the enactment of the Foreign Corrupt Practices Act are very valid and to be given weight and that this type of conduct will not be permitted in the business community.

Now, that is all I have, your Honor.

THE COURT: Thank you. Mr. Sear , is there a response?

MR. SEAR: Yes. Certain of the points made by Mr. Levy , I can't really respond to because he is indicating he has received the information that we have never been made privy to and we don't know anything about, and if he has got it, he has got it, and if he doesn't, he doesn't. I don't think those sort of general observations provide the proper basis for determining what fine ought to be given to Kirkpatrick.

Secondly, with respect to the situation in Nigeria, I don't think that again, present political situation, what has happened there, is also a highly relevant fact that ought to be given a lot of weight.

The one thing that concerns me the most is, though, and I do want to respond to, and that is the notion that other individuals at the company, one of whom is still there, acted

along with Mr. Carpenter. I mean, the memorandum that I gave to Mr. Levy back in November, that I have referred to, they show that Mr. Crankle was a recipient . But I know Mr. Carpenter has, both through his lawyers and directly to me, told me that he acted alone. And it is my understanding that is what he has told the Government and I know the Government indicated that Mr. Carpenter had cooperated fully and had been truthful with him.

Indeed, Mr. Levy and his then supervisor and I had a conversation almost a year -- well, over a year ago, I guess, in which we discussed the situation with respect to Mr. Crankle, because it was brought up, the fact that he is still with the company and he is indicated as a recipient of this memo. My position then was, look , we are going to act responsibly. We are not going to go out and fire somebody to help us in connection with an investigation. But if we learn of evidence that somebody was involved in a crime, participated in a crime, we will take appropriate action, but to this date, all that we have heard and been told is that he is shown as a recipient on the memo.

It is my understanding Mr. Carpenter has simply said, Mr. Crankle got this memo, that is about it, that is all I can tell you. Again, this is somebody who the Government said to your Honor had been truthful and candid. Now, the point I am -- all I am really making here is that the fairly construed, no matter how you say whose name is on the memo or whatever, this was an individual act by one person. I mean, I have enormous sympathy for Mr. Carpenter. The situation that he found himself in, and I think he truly was trying to do good for the company as well as himself but this is not a situation where you have a bunch of people at the company and you have corporate policy, you have a truly corporate act that demands some stern response. It is a situation in which one man committed a crime and because of the theory of vicarious responsibility, the company is responsive.

So I think the Court ought to take that sort of reality in account, and unless you have any questions, I have no further comments at this time.

THE COURT: No, I have no further questions. Mr. Levy.

MR. LEVY: Yes, your Honor

THE COURT: I want to be sure I do hear out both counsel.

MR. LEVY: All right. Mr. Carpenter has made a series of approximately four, perhaps five proffers to the Government in which he completely details his involvement from beginning to end with this Nigerian contract and the improper payments to Ackendelli, and during the course of this, he describes the circumstances that led him to writing these memos.

Well, the reason that he wrote the memos is because he wanted these two individuals that are named on these documents to be completely aware of everything that was happening in the event that he was to leave the corporation, which he was going to do in January of 1983. He fully discussed it with these two individuals. They lived this on a day-to-day basis. That is the reason he wrote it. He was not acting alone. He was acting, I must admit he was acting for the benefit of himself, but he was also acting for the benefit of the corporation because he knew that the corporation needed that contract, that 10.8 million dollars contract.

When I read Mr. Sear's memo that the corporation did not profit, I was absolutely flabbergasted. To give the company a million dollars, for them to conduct their business operations for them to meet -- to have the funds necessary to meet their day-to-day survival is an absolute benefit, in the eyes of the Government. And that is why we told the probation officer that any that any fine in terms of the Government's case must be considered substantial when measured against that

approximately 1 million dollars profit. Thank you, your Honor.

THE COURT: I guess one of the more difficult things in this case is the fact that we are dealing with a corporation, and sometimes it is like punching a bag of smoke. You kind of wonder where the real damage is done by the actions against the corporation. Many times, frankly, innocent people can suffer. And I respect that argument that is made by Mr. Sear. I do note that I have a document before me that does indicate that, with respect to the presentence report, that W. S. Kirkpatrick & Company has fully reviewed it and they have made their comments with respect to that report in their presentencing memorandum.

That was executed today, January 6, 1986.

There are a couple of things that I think are worthy of some comment, and as I say, it is not an easy matter to try to establish what should be the real deterrent in this case. But I am somewhat influenced by the fact that the corporation, and it doesn't seem to be much dispute, did take the initiative to whatever degree, in cooperating with the Justice Department once it was known that they were, or that Mr. Carpenter was somewhat involved in violation of this act, and this Foreign Corrupt Practices Act, as indicated in the presentencing memo. Apparently counsel for the corporation went to Washington and actually hand-delivered certain key documents which perhaps would have been found in any event, but made the search a lot easier. There is indication that the corporation has a policy and the policy is one where naturally it would indicate that it doesn't condone any violation of the foreign corrupt Practice Act.

The corporation further indicates that their profit margin before they entered into this situation was set before the total involvement with the corruption in Nigeria . I guess the indication there being that the profit was certain, certainly not expanded but what had to be build into it was this payment in order to facilitate the granting of the contract. All in all it

doesn't indicate the purest of intention on the part of the corporation. The corporation is in fact involved.

But then it comes to the matter of imposing a fine. The presentencing memorandum itself filled with indications and the letters that I have received from the actual employees of the corporation indicating that there is really no ability of the corporation to pay, that they haven't paid dividends since 1978, I believe it was, that the real victims here would be the lower level employees who would suffer because the corporation would actually respond by making funds available, taking them away form those who perhaps are most innocent, and I think that is the perplexing part of this kind of a sentencing, when you seem to want to move against a small corporation, small in that the victim is more identifiable as being the lower level employee, as against Mr. Carpenter who in order to achieve his bonus could very well have been stimulated into acting personally but we can't say that that action only went to Mr. Carpenter.

Actually, the corporation simply by benefit of obtaining the contract benefited through the profit to some degree. And I can't completely ignore the fact, although it is absolutely no excuse, that corruption is a way of life from the records before me in Nigeria, and I think that is one of the most disturbing facts that I confront, because when you do look at corruption being a way of life, you have to realize that the victims, the ultimate victims of that corruption are the poor souls in Nigeria who certainly are suffering enough, but who become greater victims at the hands of those who corrupt in the name of their government, and yet they are out of reach of this Court, and I think that is where the real danger lies.

Mr. Levy makes a point that the corporation knew and that seems to be refuted. I think for the purposes of this sentencing, that I don't have to go beyond what was capable of proof in any event, because I think if there are those who knew, who are still there, they should be the real persons to respond for the damage that they have created because they can be subject to punishment as individuals, that there were no

other violations that they occurred outside the statute of limitations.

I have no proof before me to know how to measure that and I didn't consider that in the sentencing, that a competitor suffered. Again, there is no real proof against the corporation after their plea to know how to measure some of the allegations, although they are there, and again, I give no real weight to that factor in the sentencing. That their are efforts to reach the foreign bank accounts, I can appreciate that that is occurring and should occur, but again, I have no way of measuring that fact from our records at this sentencing, and that there are present employees who are targets, perhaps, or being pursued by the Government, people still in existence in the corporation, I think that is perhaps where the investigation should go, and for my purposes this afternoon, that information should not play any part in the sentencing here because I am bound in fairness by the record that is before me.

I have no hesitation in saying those who authorized or participated in should be the real targets of the Government's investigation. We are now left, however, with the corporation. How do you deal in fairness with a corporation that is small and says that the real victims are going to be those who did not participate in it, the lower level employees? The corporation that says it really can't afford to pay, that any substantial fine would drive them out of existence, almost like a death sentence to a corporation.

And being a human being, and you try to measure these things, it is not an easy matter to measure because you do have a certain amount of feeling, and one feeling is that I totally respect the passage of the Foreign Corrupt Practices Act because I think that if the Government is ever going to give a signal as to what fair dealing is, it has to do it, this is one way of doing it and that act must be respected.

So that we indicate that it is a way of life in other nations, it can't be a way of functioning by citizens of this nation, and I think that is the way we started, indicating what the ideals to

which we are dedicated really mean, and that is by living them here, so that even though it is a new act and we don't have a lot of experience as to how to sentence corporations under it, it is an act which nevertheless must be fully recognized and allayed.

The next question is how do you balance that? Whatever signal should be given to the corporations of the United States in saying that that act will be followed, and I think in doing it with some balance and some fairness those who are actually before the Court now, I think the $10,000 requested by counsel is certainly not sufficient to indicate that this kind of activity will not be condoned. I think the measurement has to be one where the amount has to be substantial as applied to this corporation, where the amount of the fine should certainly not be taken as precedent against any other individual corporation because I hope it is a measurement of what should be the fine to this corporation, taking all of the circumstances before me, by giving full consideration to all the circumstances presently before me.

The fine that this Court feels should be imposed, under the circumstances of this case, is a fine of $75,000 to be payable within an arrangement with the probation office over the period of five years. That is certainly not the $10,000 requested by counsel. It is certainly not a figure that I think is totally punitive to the extent of playing partially against the innocent victims of that corporation, but I hope it is one that because this is a new area of the law and we don't have a lot of precedent to measure. that does sound the signal to say perhaps this is a learning process. Violation of this act will not be condoned and if lessons are not learned, perhaps the fines will have to be stiffer in the future.

Under the circumstances, gentlemen, I think a sentence in this case would be $75,000 payable by W. S. Kirkpatrick & Company over a period of five years. That arrangement to be worked out by the Probation Department. Is there anything further?

MR. LEVY: The Government has nothing further, your Honor.

MR. SEAR: No, your Honor, other than to say it has been a pleasure and a privilege to be before you.

THE COURT: Thank you.

MR. HORN: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL County Line Industrial Park Southampton, PA 18966	:	CIVIL ACTION NO. 86-796-HJS
v.	:	
W.S. KIRKPATRICK & CO., INC. 22 Audrey Place Fairfield, New Jersey	:	
and	:	
DIC (HOLDING) Inc. 767 Fifth Avenue New York, New York 10153	:	
and	:	
INTERNATIONAL DEVELOPMENT CORPORATION, S.A. C/O INTERNATIONAL SHIPPING & TRADING SERVICES, S.A. P.O. Box 604 Luxembourg	:	
and	:	
Harry G. Carpenter P.O. Box 192 (Holland Road) Bedminister, NJ 07921	:	
and	:	

BENSON "TUNDE" AKINDELE
Flat 25
The Watergardens
Burwood Place
London W2, England

and

JOHN M. KRANKEL
36 Elden Place
Fairlawn, New Jersey

and

W.S. KIRKPATRICK & CO., INTERNATIONAL
22 Audrey Place
Fairfield, New Jersey

and

EMRO ENGINEERING CO., INC.
P.O. Box 536
Summit, NJ 07901

and

ROBERT W. RUPPERT
c/o EMRO ENGINEERING CO., INC.
P.O. Box 536
Summit, NJ 07901

and

ROSS E. SAXON
c/o NAUTILUS ENVIROMEDICAL SYSTEMS, INC.
13800 Westfair East Drive
Houston, TX 77041

and :
:
R.H. EDWARDS :
15 Woodland Court :
Kinndlon, New Jersey 07405 :

AMENDED COMPLAINT

I. THE PARTIES

1. Environmental Tectonics Corporation, International ("ETC"), Plaintiff herein, is a Delaware corporation having its principal place of business at County Line Industrial Park, Southampton, Pennsylvania 18966.

2. Defendant W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick"), is a New Jersey corporation having its principal place of business at 22 Audrey Place, Fairfield, New Jersey.

3. Defendant DIC (Holding) Inc. ("DIC") is a Delaware corporation having its principal place of business at 767 Fifth Avenue, New York, New York 10153 and regularly doing business within the State and District of New Jersey at 22 Audrey Place, Fairfield, New Jersey.

4. Defendant International Development Corporation, S.A. ("IDC"), is a corporation duly organized pursuant to the laws of the country of Luxembourg having a principal place of business at the premises of International Shipping and Trading Services, S.A., P.O. Box 604, Luxembourg, and regularly doing business within the State and District of New Jersey at 22 Audrey Place, Fairfield, New Jersey.

5. Defendant Harry G. Carpenter ("Carpenter") is an individual citizen of the State of New Jersey having his residence in Bedminister, New Jersey, and at all times relevant hereto regularly conducted business at 22 Audrey Place,

Fairfield, New Jersey, as the Chairman of the Board of Directors and Chief Executive Officer of Kirkpatrick.

6. Defendant Benson "Tunde" Akindele ("Akindele") is a citizen of Nigeria residing at Flat 25, The Watergardens, Burwood Place, London, W2, England, and at all times relevant hereto regularly conducted business within the State and District of New Jersey at 22 Audrey Place, Fairfield, New Jersey.

7. Defendant John M. Krankel ("Krankel") is an individual citizen of the State of New Jersey residing at 36 Elden Place, Fairlawn, New Jersey. At all times relevant hereto, Krankel was Secretary and Treasurer of Kirkpatrick.

8. Defendant W.S. Kirkpatrick & Co., International ("Kirkpatrick International"), is a corporation duly organized and existing under the laws of the State of New Jersey with its principal place of business at 22 Audrey Place, Fairfield, New Jersey.

9. Defendant Emro Engineering Co., Inc. ("Emro"), is a New Jersey corporation doing business regularly in the State of New Jersey and is engaged in the business of providing engineering and design services in, *inter alia*, the aeromedical field and is involved with manufacture and/or sale of, *inter alia*, aeromedical equipment.

10. Defendant Robert W. Ruppert ("Ruppert") was, at all relevant times, the President and Chief Executive Officer of Defendant Emro, and, upon information and belief, a citizen of New Jersey.

11. Defendant Ross E. Saxon ("Saxon"), who is believed to be a Texas citizen, was, at all relevant times, the Chairman of the Board of Directors and Chief Executive Officer of Nautilus Environmentals, Inc., formerly a Texas corporation which was in March 1983 reincorporated in the State of Delaware and which thereupon changed its name to Nautilus EnviroMedical Systems, Inc. (collectively "NEI"). NEI

maintains its principal place of business at 13800 Westfair East Drive, Houston, Texas 77041. At all times relevant hereto, NEI and Saxon conducted business in the State and District of New Jersey with Kirkpatrick and Kirkpatrick International.

12. Defendant Robert H. Edwards ("Edwards") is a citizen of the State of New Jersey and was, at times relevant hereto, the President of Defendant Kirkpatrick.

II. JURISDICTION AND VENUE

13. The jurisdiction of this Court is founded upon 28 U.S.C. §1331 (Counts 1, 3 and 4); 18 U.S.C. §§1964(c) and 1965(a) (Count 1); 28 U.S.C. §1332 (Counts 2, 5, 6 and 7); 15 U.S.C. §15 and 28 U.S.C. §1337 (Counts 3 and 4); and the pendant jurisdiction of this Court is invoked as to Counts 2, 5, 6 and 7.

14. Venue is properly laid in this District pursuant to 18 U.S.C. §1965 and 28 U.S.C. §1391.

III. THE CONDUCT OF DEFENDANTS COMPLAINED OF BY PLAINTIFF; THE PATTERN OF DEFENDANTS' RACKETEERING ACTIVITIES.

15. Defendant Kirkpatrick, at all times pertinent hereto, was a New Jersey corporation that sold and brokered aircraft equipment, parts and facilities to various airlines and airports, including airlines and airports and national air forces having their principal place of business outside of the United States of America.

16. Commencing in 1954, Defendant Carpenter became an employee of Defendant Kirkpatrick and thereafter eventually became a major shareholder in Kirkpatrick, the Chairman of the Board of Directors of Kirkpatrick and the Chief Executive Officer of Kirkpatrick.

17. Kirkpatrick International, a Domestic International Sales Corporation ("DISC") and wholly owned subsidiary of Kirkpatrick, was operated by DIC, Kirkpatrick and Carpenter for the benefit of Carpenter, Kirkpatrick and DIC and not for its own benefit.

18. At all times pertinent hereto, Defendant DIC was the owner of all of the shares of stock, either directly or indirectly, of Defendant Kirkpatrick and, derivatively, of Kirkpatrick International and, thereby, engaged in selling and brokering aircraft equipment, parts and facilities to various airlines and airports, including airlines and airports and national air forces having their principal place of business outside of the United States of America.

19. At all times pertinent hereto, Defendant IDC was the owner of all of the shares of stock, either directly or indirectly, of Defendant DIC and, thereby, of all of the stock, either directly or indirectly, of Defendants Kirkpatrick and Kirkpatrick International and, thereby, engaged in selling and brokering aircraft equipment, parts and facilities to various airlines and airports, including airlines and airports and national air forces having their principal place of business outside of the United States of America.

20. On or about January 3, 1978, Defendant Carpenter sold all of his shareholdings and equity interest in Kirkpatrick to Defendant DIC.

21. On or about January 3, 1978, Defendant Carpenter entered into a contract of employment and consulting agreement with Defendant Kirkpatrick and/or Defendant DIC (and, thereby, with Defendant IDC) whereby Defendant Carpenter agreed to remain as Chairman of the Board of Kirkpatrick and Chief Executive Officer of Kirkpatrick for a period of five years from that date.

22. At all times pertinent hereto, Defendant Carpenter acted as the agent, servant or employee of Defendants Kirkpatrick, Kirkpatrick International, DIC, IDC, Krankel,

Edwards, Emro, Ruppert and of Saxon, and each of the acts of Defendant Carpenter described herein was performed by Defendant Carpenter within the course of his employment and within the scope of authority possessed by him as an employee, servant or agent of Defendants Kirkpatrick, Kirkpatrick International, DIC, IDC, Emro, Krankel, Edwards, Ruppert, Saxon, and of NEI.

23. Defendants Krankel and Edwards, at all times pertinent hereto, acted as the agent, servant or employee of Defendants Carpenter, Kirkpatrick, Kirkpatrick International, DIC, IDC, Emro, Ruppert and of Saxon, in connection with the transactions and unlawful payments described herein and, in so doing, acted specifically within the scope of the authority possessed by them as agents, servants or employees of such Defendants.

24. As to all of the acts and violations alleged herein, and otherwise, Defendants Kirkpatrick, Kirkpatrick International, DIC and IDC acted as a single economic enterprise based upon the following facts, among others:

(1) Kirkpatrick International, at all relevant times, upon information and belief, had Officers and Directors which were identical or nearly identical with the Officers and Directors of Kirkpatrick.

(2) Kirkpatrick International had no employees and no substantial assets of its own, even though it undertook an obligation with Nigeria for over $10,000,000.00. Instead, the Nigerian Contract (defined hereinafter) was performed by Kirkpatrick through the use of Kirkpatrick employees, funds and resources. Kirkpatrick International was severely undercapitalized for an undertaking of the magnitude of the Nigerian Contract.

(3) Kirkpatrick and Kirkpatrick International maintained consolidated financial statements and Kirkpatrick International's financial condition was not separately reported.

(4) The Board of Directors and Officers of Kirkpatrick, and not Kirkpatrick International, actively managed and conducted the affairs of Kirkpatrick International.

(5) Kirkpatrick International failed to observe, in any significant way, any corporate formalities.

(6) When Kirkpatrick International was awarded the Nigerian Contract, Kirkpatrick publicly announced that it, Kirkpatrick, had been awarded this Contract.

(7) Kirkpatrick has pled guilty to a violation of the Foreign Corrupt Practices Act with respect to the Nigerian bribes described herein, even though the Nigerian Contract was ostensibly between Kirkpatrick International and Nigeria.

(8) Kirkpatrick made substantial loans to Emro and NEI to permit Emro and NEI to perform subcontracts with Kirkpatrick International.

(9) When DIC acquired Kirkpatrick in January 1978, DIC's legal counsel and a member of its Board of Directors was placed on the Board of Directors of Kirkpatrick and has been the only Director of Kirkpatrick who has continuously remained a Director of Kirkpatrick from January 1978 to the present time.

(10) Pursuant to an agreement between Kirkpatrick and DIC, DIC has been retained as the manager of Kirkpatrick for a fee of $240,000 per year.

(11) DIC has repeatedly borrowed money from Kirkpatrick, sometimes interest-free, even though such borrowings have threatened the financial stability of Kirkpatrick.

(12) Upon information and belief, DIC has required that it approve, and has in fact approved, significant financial commitments and expenditures of Kirkpatrick, including the bribes paid to Nigerian officials through Akindele.

(13) IDC, as the owner of DIC, has operated the affairs of DIC and Kirkpatrick for its own benefit and not for the benefit of Kirkpatrick or DIC by, *inter alia*, permitting one of its owners or executives to hold or withhold significant funds of Kirkpatrick, even though such actions seriously jeopardized the financial condition of Kirkpatrick.

(14) One of IDC's principals or executives settled a large claim with a Kirkpatrick International/Kirkpatrick subcontractor, even though Kirkpatrick's Chief Executive Officer and Board did not approve or agree to such settlement, nor was such settlement in the best interest of Kirkpatrick or Kirkpatrick International.

25. In or about 1980, while acting as Chairman of the Board of Kirkpatrick and Chief Executive Officer of Kirkpatrick, Carpenter learned of an opportunity for Kirkpatrick or Kirkpatrick International to sell aeromedical equipment consisting of ejection set trainers, disorientation simulators and other devices to the Nigerian Air Force and for the construction of an aeromedical center at Kaduna Air Force Base in Nigeria.

26. Defendant Emro, by and through the actions of its officer, agent and employee, Defendant Ruppert, as early as March 1981, and continuing thereafter into 1984, agreed to act as the designer of some or all of the equipment which was to be sold to the government of Nigeria by Kirkpatrick or Kirkpatrick International, and to provide engineering services incident to the manufacture and sale of such aeromedical equipment.

27. Defendant Saxon, acting as an officer, agent, servant and employee of NEI, caused NEI to agree as early as March 1981 that NEI would act as the manufacturer and supplier, *inter alia*, of some or all of the equipment to be sold to Nigeria by Kirkpatrick or Kirkpatrick International and agreed that NEI would perform services incident thereto.

28. At all times pertinent hereto, Plaintiff ETC was, like Defendants Kirkpatrick, Kirkpatrick International, DIC, IDC, Emro and NEI, a company engaged in the business of manufacturing and selling aircraft equipment, parts, materials and facilities to airlines and airports, including airlines and airports and national air forces having their principal place of business outside of the United States of America.

29. Specifically, at all times relevant hereto, Plaintiff ETC was engaged in the business of designing, building, manufacturing, supplying, selling and installing aeromedical equipment including, but not limited to, ejection seat trainers and disorientation simulators and the construction of aeromedical facilities.

30. In or about 1981, like Defendant Carpenter on behalf of all other Defendants and NEI, Plaintiff ETC became aware of the opportunity to sell aeromedical equipment consisting of ejection seal trainers, disorientation simulators and other devices to the Nigerian Air Force and for the Construction of an aeromedical center at Kaduna Air Force Base in Nigeria.

31. In 1981, being aware, *inter alia*, of competition provided, or to be provided, by Plaintiff ETC to the Defendants herein with respect to the opportunity for sale recited in this Complaint, Defendant Carpenter negotiated an agreement with Defendant Akindele whereby Akindele acted as the local agent of all Defendants, and each of them, in Nigeria with respect to the sale opportunity recited above.

32. In the same agreement referred to in the preceding paragraph of this Complaint whereby Akindele was retained to act as the local agent for Defendants, and each of them, in Nigeria, Defendant Carpenter, acting with the authority of, and on behalf of, Defendants, and each of them, agreed that Defendants would pay a "commission" to two Panamanian bearer share corporations named, respectively, Deriks Industrial Holding ("Deriks") and Los Holding Marketing Consultants Corporation ("Los") in an amount equal

to twenty percent (20%) of the contract price for the aeromedical equipment and aeromedical facility ultimately to be quoted to — and to be agreed to be paid by — Nigeria, the vast majority of which commission (it was orally agreed) would be paid as bribes to officials of the government of Nigeria.

33. Contracts providing for payment of the bribes by Defendants, and each of them, to and through the Panamanian bearer share corporations — Deriks and Los — were executed in or about May 1981 and Defendant Akindele thereafter began to assist Defendants, and each of them, in negotiations with various Nigerian officials for the sale of the aeromedical equipment and facility previously described, which negotiations were in direct competition with Plaintiff ETC.

34. Concurrently with the execution in May 1981 of the contracts referred to in the preceding paragraph of this Complaint, Defendants increased their bid price to the Government of Nigeria for the aeromedical equipment and facility herein described so as to include the twenty percent (20%) bribe to be paid to and through the Panamanian corporations as described above.

35. In September 1981, Defendant Akindele advised Defendant Carpenter that the twenty percent (20%) commission to be paid to the Panamanian bearer corporations described in the preceding paragraphs of this Complaint was in fact to be paid to Akindele himself and to various Nigerian political and military figures in the following proportions:

2-1/2%	-	for Akindele;
5%	-	for Air Force;
2-1/2%	-	for medical group;
5%	-	for the Party;
2-1/2%	-	for the minister himself; and
2-1/2%	-	for other key defense personnel.

Each percentage reflects the percentage of the total contract price for the sale of the aeromedical equipment and facility to the Government of Nigeria.

36. Concurrently within his advice as to the distribution of the twenty percent (20%) "commission" as described in the preceding paragraph of this Complaint, Defendant Akindele advised Defendants, and each of them, that the payments to be made to the political and military figures in Nigeria as described in the preceding paragraph of this Complaint were intended as bribes in order to insure that Defendant Kirkpatrick's nominee, Kirkpatrick International, for the benefit of all Defendants, would obtain the contract from Nigeria for the purchase of the aero medical equipment and facility and Defendants, and each of them, thereupon agreed to — and authorized — payment of these bribes.

37. Thereafter, on March 19, 1982, Nigeria signed a contract (the "Nigerian Contract") awarding the construction of the aeromedical facility and the supply of the aeromedical equipment to Kirkpatrick International which entered into such contract, and accepted the benefits thereof, both on behalf of itself and on behalf of all Defendants. Attached hereto, incorporated herein and marked Exhibit "A" is a true and correct copy of the Nigerian contract.

38. The price agreed to be paid by Nigeria for the equipment and facility pursuant to the Nigerian Contract included the bribe(s) described in the preceding paragraphs of this Complaint.

39. Prior to the award of the subject contract, Plaintiff ETC negotiated with and submitted its bid to Nigeria for, the aeromedical facility in direct competition with Defendants, and was under active consideration by Nigeria for award of the Nigerian Contract, but the bid was not accepted by Nigeria because of the bribes which were paid and which were agreed to be paid by Defendants, as aforesaid. ETC was capable of performing and prepared to perform on the contract awarded to Kirkpatrick International by Nigeria.

40. Absent the payment of bribes by Defendants, as described herein, and absent the agreement of the Defendants to pay such bribes, upon information and belief, the Nigerian Contract would have been awarded to ETC and not to Kirkpatrick International.

41. Upon the execution by Nigeria of the Nigerian Contract on or about March 19, 1982 as described in the preceding paragraphs of this Complaint, Plaintiff ETC lost and was deprived of the commercial opportunity to supply the aeromedical equipment and to construct the aeromedical facility as to which it had been in direct competition with Defendants prior thereto.

42. Thereafter, in September 1982, Nigeria made its initial payment to Defendants pursuant to the terms of the Nigerian Contract.

43. Immediately thereafter, on September 30, 1982, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amounts of $117,920.34 and $193,657.70 to be made, respectively, to the Panamanian corporation Deriks and to the Panamanian corporation Los and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and to the Nigerian political and military figures in the proportions described in paragraph 35 of this Complaint.

44. The payments made on September 30, 1982 as described in the preceding paragraphs of this Complaint constituted approximately twenty percent (20%) of the initial payment made by Nigeria in September 1982 on the Nigerian Contract and were made by Defendants pursuant to the contract of May 1981 and the understandings of September 1981 as set forth in the preceding paragraphs of this Complaint.

45. On December 21, 1982, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amount of $290,486.50 to be

made to each of the Panamanian corporations — Deriks and Los — and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and the Nigerian political and military figures in the proportions as described in paragraph 35 of this Complaint.

46. The payments made on December 21, 1982 as described in the preceding paragraphs of this Complaint constituted approximately twenty percent (20%) of the payments theretofore made by Nigeria pursuant to the Nigerian Contract and were made by Defendants pursuant to the contract of May 1981 and the understandings of September 1981 as set forth in the preceding paragraphs of this Complaint.

47. On February 2, 1983, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amount of $145,243.27 to be made to each of the Panamanian corporations — Deriks and Los — and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and the Nigerian political and military figures in the proportions as described in paragraph 35 of this Complaint.

48. The payments made on February 2, 1983 as described in the preceding paragraphs of this Complaint constituted approximately twenty percent (20%) of the payments theretofore made by Nigeria pursuant to the March 19, 1982 contract and were made by Defendants pursuant to the Nigerian Contract and the understandings of September 1981 as set forth in the preceding paragraphs of this Complaint.

49. On August 8, 1983, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amount of $290,486.50 to be made to each of the Panamanian corporations — Deriks and Los — and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and the Nigerian political and military figures in the proportions as described in paragraph 35 of this Complaint.

50. The payments made on August 8, 1983 as described in the preceding paragraphs of this Complaint constituted the balance of approximately twenty percent (20%) of the total purchase price paid by Nigeria pursuant to the Nigerian Contract and were made by Defendants pursuant to the contract of May 1981 and the understandings of September 1981 as set forth in the preceding paragraphs of this Complaint.

IV. THE ENTERPRISES

51. Deriks is a Panamanian corporation which was engaged in, and the activities of which affected, both interstate and foreign commerce and thus constitutes an enterprise within the meaning of 18 U.S.C. §1961(4).

52. Los is a Panamanian corporation which was engaged in, and the activities of which affected, both interstate and foreign commerce and thus constitutes an enterprise within the meaning of 18 U.S.C. §1961(4).

53. Defendants Carpenter, Akindele, Kirkpatrick, DIC, IDC, Emro, Krankel, Ruppert, Saxon and Kirkpatrick International are an association in fact of individuals and corporations within the meaning of 18 U.S.C. §1961(4), which enterprise was engaged in, and the activities of which affected, both interstate and foreign commerce.

54. Kirkpatrick International is a New Jersey corporation engaged in, and the activities of which affect both interestate and foreign commerce and thus constitutes an enterprise within the meaning of 18 U.S.C. §1961(4).

V. THE RACKETEERING ACTIVITIES

55. The acts of Defendants, and each of them, as described in the preceding paragraphs of this Complaint constitute racketeering activities as defined by Section 1961(1)

of Title 18 of the United States Code, both generally and in the following particular respects:

(a) each of the payments made to each of the Panamanian corporations on September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983 constitutes, depending upon the method by which each payment was made, a violation of 18 U.S.C. §1341 (relating to mail fraud) and/or Title 18 of the United States Code §1343 (relating to wire fraud) in that the mails or wires were used or were caused to be used in furtherance of a scheme or artifice to defraud and/or to obtain money or property by means of false or fraudulent pretense or representations;

(b) each of the payments made to the Panamanian corporations on September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983 constitutes an act involving bribery chargeable under the laws of the State of New Jersey and punishable by imprisonment for more than one year; and

(c) each of the payments made to the Panamanian corporations on September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983 constitutes a violation of Title 15 of the United States Code §78 (dd-1) relating to foreign corrupt practices by issuers of securities and, hence, constitutes an act of fraud in the sale of securities.

56. The acts of the Defendants, and each of them, as described in the preceding paragraphs of this Complaint, constitute "racketeering activity" as defined by N.J.S.A. §2C:41-1, *et seq.*, both generally and in the following particular respects:

(a) conduct defined as racketeering activities under Title 18 of the United States Code §§1961(1)(A), (B) and (D); and

(b) bribery.

56. The acts which constitute racketeering activities set forth above constitute a pattern of racketeering activity within the meaning of Section 1961(5) of Title 18 of the United States Code and N.J.S. 2C:41-1d, all of which occurred after June 15, 1981 and within a ten year period.

57. Upon information and belief, the affairs of the enterprises were also conducted through a pattern of racketeering activities with similar purposes, results, participants, victims and methods of commission in that Kirkpatrick International had previously engaged in one or more racketeering activities on contracts unrelated to the Nigerian Contract through foreign official bribery constituting one or more violations of the mail and wire fraud statutes, 18 U.S.C. 18 U.S.C. §1341, 1343, and the Foreign Corrupt Practices Act, 15 U.S.C., §78 (dd-1).

58. The acts of the Defendants, and each of them, as set forth in the preceding paragraphs of this Complaint, were acts which caused and permitted Defendants, and each of them, through a pattern of racketeering activity, to acquire and/or to maintain, directly or indirectly, interests in and control over each of the enterprises described in the preceding paragraphs of this Complaint, including the Panamanian corporations Deriks and Los, the association in fact of individuals and corporations described in paragraph 53 above, and Kirkpatrick International, as well as the Defendant corporations themselves, all in violation of Section 1962(b) of Title 18 of the United States Code and of N.J.S. 2C:41-2b.

59. The Defendants, and each of them, through the acts set forth above, conducted and/or participated, directly and/or indirectly, in the conduct of, the affairs of the enterprises identified in the preceding paragraphs of this Complaint, including the Panamanian corporations Deriks and Los, the association in fact of individuals and corporations described in paragraph 53, above, Kirkpatrick International, as well as the Defendant corporations themselves, through a pattern of racketeering activity at a time and under circumstances when Defendants, and each of them, was employed by and/or

associated with each such enterprise, all in violation of 18 U.S.C. 1962(c) and N.J.S. 2C:41-2c.

60. By engaging in the acts as set forth in the preceding paragraphs of this Complaint Defendants, and each of them, conspired to violate 18 U.S.C. §§1962(b) and (c), all in violation of 18 U.S.C. §1962(d) and in violation of N.J.S.A. 2C:41-2d.

COUNT I

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. W.S. KIRKPATRICK & CO., INC., DIC (HOLDING) INC., INTERNATIONAL DEVELOPMENT CORPORATION, S.A., HARRY G. CARPENTER, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON AND R.H. EDWARDS

61. Plaintiff ETC incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

62. By virtue of the acts of the Defendants, and each of them, as described in the preceding paragraphs of this Complaint which constitute violations of Sections 1962(b), (c) and (d) of Title 18 of the United States Code, Plaintiff ETC has been damaged in its business and property including, but not limited to, lost profits arising from ETC's failure to be awarded the contract for the supply of aeromedical equipment and the construction of an aeromedical facility in Nigeria, which lost profits are in the approximate amount of Three Million Dollars ($3,000,000.00) and which failure to be awarded the Nigerian Contract was caused solely and proximately by the racketeering activities committed by the Defendants as described in this Complaint.

63. By virtue of the damage to its business and property as set forth in the preceding paragraph of this Complaint, Plaintiff ETC, pursuant to Section 1964(c) of Title 18 of the United States Code, is entitled to an award of damages in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit, including a reasonable attorney's fee.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against W.S. Kirkpatrick & Co., Inc., DIC (Holding), Inc., International Development Corporation, S.A., Harry G. Carpenter, Benson "Tunde" Akindele, John M. Krankel, Emro Engineering Co., Inc., Robert W. Ruppert, Ross E. Saxon and R.H. Edwards, and each of them, both jointly and severally, in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit and a reasonable attorney's fee.

COUNT II

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. W.S. KIRKPATRICK & CO., INC. DIC (HOLDING) INC., INTERNATIONAL DEVELOPMENT CORPORATION, S.A., HARRY G. CARPENTER, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON AND R.H. EDWARDS

64. Plaintiff ETC incorporated herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

65. By virtue of the acts of the Defendants, and each of them, as described in the preceding paragraphs of this Complaint which constitute violations of N.J.S.A. 2C:41-4(b) and (d), Plaintiff ETC has been damaged in its business and property including, but not limited to, lost profits arising from

ETC's failure to be awarded the contract for the supply of aeromedical equipment to and the construction of an aeromedical facility for Nigeria which lost profits constitute the approximate amount of Three Million Dollars ($3,000,000.00) and which failure to be awarded the Nigerian contract was caused solely and proximately by the acts of bribery and racketeering activities committed by the Defendants as described in this Complaint.

66. By virtue of the damage to its business and property as set forth in the preceding paragraph of this Complaint, Plaintiff ETC claims, pursuant to N.J.S. 2C:41-5c, damages in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit, including a reasonable attorney's fee.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against W.S. Kirkpatrick & Co., Inc., DIC (Holding) Inc., International Development Corporation, S.A., Harry G. Carpenter, Benson "Tunde" Akindele, John M. Krankel, Emro Engineering Co., Inc., Robert W. Ruppert, Ross E. Saxon and R.H. Edwards, and each of them, jointly and severally, in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit and a reasonable attorney's fee.

COUNT III

ENVIRONMENTAL TECTONICS CORPORATION V. W.S. KIRKPATRICK & CO., INC.; W.S. KIRKPATRICK & CO. INTERNATIONAL; DIC (HOLDING), INC. AND INTERNATIONAL DEVELOPMENT CORPORATION, S.A.

67. Plaintiff ETC incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

68. ETC is and was a competitor of each corporate Defendant and thus is a member of the class of persons which was intended to be protected by 15 U.S.C. §13(c).

69. By virtue of the acts of bribery set forth in the preceding paragraphs of this Complaint, Defendant W.S. Kirkpatrick & Co., Inc. and W.S. Kirkpatrick & Co. International, DIC (Holding), Inc. and International Development Corporation, S.A., and each of them, paid and granted a commission, brokerage or other compensation in connection with the sale or purchase of goods, wares or merchandise to the agent, representative or other intermediary of the other party to such transaction, to wit, Nigeria, all in violation of Section 13(c) of Title 15 of the United States Code.

70. By virtue of the acts of the Defendants, and each of them, as described in the preceding paragraphs of this Complaint which constitute violations of Section 13(c) of Title 15 of the United States Code, Plaintiff ETC has been injured in its business and property including, but not limited to, lost profits arising from ETC's failure to be awarded the contract for the supply of aeromedical equipment and the construction of an aeromedical facility in Nigeria, which lost profits constitute the approximate amount of Three Million Dollars ($3,000,000.00) and which failure was caused solely and proximately by those acts committed by the Defendants as described in this Complaint.

71. By virtue of the injury to its business and property as set forth in the preceding paragraphs of this Complaint, Plaintiff ETC claims, pursuant to Section 13(c) of Title 15 of the United States Code, damages in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit and a reasonable attorney's fee.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against W.S. Kirkpatrick & Co., Inc., W.S. Kirkpatrick & Co. International, DIC (Holding), Inc. and International

Development Corporation, S.A., and each of them, both jointly and severally, in the amount of Nine Million Dollars ($9,000,000.00), plus costs of suit including a reasonable attorney's fee.

COUNT IV

ENVIRONMENTAL TECTONICS CORPORATION V. DIC (HOLDING), INC. INTERNATIONAL DEVELOPMENT CORPORATION, S.A., HARRY G. CARPENTER, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON AND R.H. EDWARDS

72. Plaintiff incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

73. Each of the Defendants named in this Count IV combined, conspired and confederated with each other, with Kirkpatrick, with Kirkpatrick International, and with other persons whose identities are currently unknown to Plaintiff, to engage in the acts constituting bribery so that Kirkpatrick International could gain the contract for the supply of aeromedical products and the construction of an aeromedical facility for Nigeria, and so that each of the Defendants named in this Count IV could profit thereby.

74. Each of the conspirators named herein acted in violation of 15 U.S.C. §13(c) by engaging in this conspiracy.

75. By virtue of the acts of each of the conspirators named in this Count IV, as described herein, and as described in the preceding paragraphs of this Complaint, Plaintiff has been injured in its business and property including, but not limited to, lost profits arising from ETC's failure to be awarded

the contract for the supply of aeromedical equipment and the construction of an aeromedical facility in Nigeria, which lost profits constituted the approximate amount of Three Million Dollars ($3,000,000.00) and which failure was caused solely and proximately by the acts of bribery committed by Kirkpatrick, Kirkpatrick International and the conspirators named in this Count IV, all as described in this Complaint.

76. By virtue of the injury to its business and property as set forth in the preceding paragraphs of this Complaint, Plaintiff ETC claims, pursuant to Section 13(c) of Title 15 of the United States Code, damages in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit and a reasonable attorney's fee.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against Defendants DIC (Holding), Inc., International Development Corporation, S.A., Harry G. Carpenter, Benson "Tunde" Akindele, John M. Krankel, Emro Engineering Co., Inc., Robert W. Ruppert, Ross E. Saxon and R.H. Edwards, and each of them, both jointly and severally, in the amount of Nine Million Dollars ($9,000,000.00), plus costs of suit including a reasonable attorney's fee.

COUNT V

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. EMRO ENGINEERING CO., INC. AND ROBERT W. RUPPERT

77. Plaintiff incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

78. During the period of time when Kirkpatrick International's bid to Nigeria was under consideration by Nigeria, ETC was actively pursuing contract discussions and

negotiations with officials, agents and representatives of Nigeria.

79. In connection with ETC's activities described in the foregoing paragraph of this Complaint, ETC's representative William Mitchell travelled to Nigeria and engaged in contract discussions and negotiations.

80. Shortly after William Mitchell travelled to Nigeria, Emro, acting through its corporate President, Defendant Ruppert, authored and published a letter to Group Captain Isaac A. Odeh, Director of Medical Services, Ministry of Defense, Lagos, Nigeria, dated December 10, 1981 (the "Letter"). Attached hereto, incorporated herein and marked Exhibit "B" is a true and correct copy of the Letter.

81. The Letter contained false and misleading representations concerning ETC. Among other things, the Letter inaccurately stated: (1) that Emro had terminated ETC as its sales representative; (2) that ETC had previously misrepresented itself as designer and manufacturer of Emro products; and (3) that the aforesaid termination involved "dishonest conduct" by ETC.

82. Defendants Emro and Ruppert knew these misrepresentations to be false when Ruppert, acting on his own behalf and on behalf of Emro, made these misrepresentations, and these misrepresentations were made without any lawful privilege.

83. These misrepresentations constitute defamation *per se* and libel *per se*.

84. ETC came to learn of the Letter, and the contents thereof, in or about May 1986 when a copy of such letter was surrendered to ETC by Kirkpatrick.

85. The libelous statements contained in Exhibit "B" hereto proximately caused injury to ETC.

86. The actions of Emro and Ruppert as set forth in this Count V were undertaken maliciously, with actual knowledge of the falsity of the misrepresentations in the Letter, with reckless disregard for the truth of such representations, and an award of punitive damages should be made against Emro and Ruppert, and each of them, so that they, and all those that come to learn of this conduct and any punitive damages awarded hereon, should never again engage in such conduct.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against Defendants Emro Engineering Co., Inc. and Robert W. Ruppert, and each of them, both jointly and severally, in the amount of Three Million Dollars ($3,000,000.00), plus punitive damages and costs of suit.

COUNT VI

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. EMRO ENGINEERING CO., INC. AND ROBERT W. RUPPERT

87. Plaintiff incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

88. Through the misrepresentations contained in the Letter, Defendants Emro and Ruppert improperly interfered with ETC's prospective contract relations with Nigeria.

89. The actions of Emro and Ruppert complained of in this Count VI were undertaken with malicious intent and such actions transgressed generally accepted standards of morality.

90. Defendants Emro and Ruppert engaged in this intentional interference with prospective contract relations without just or proper cause and were not privileged so to do.

91. As the direct and proximate result of the intentional interference with prospective contract relations alleged in this Count VI, Defendants Emro and Ruppert solely and proximately damaged ETC by depriving ETC of profits in the approximate amount of Three Million Dollars ($3,000,000.00) which profits would have been achieved by ETC had it been awarded the contract with Nigeria.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against Defendants Emro Engineering Co., Inc. and Robert W. Ruppert, and each of them, both jointly and severally, in the amount of Three Million Dollars ($3,000,000.00), plus costs of suit including a reasonable attorney's fee.

COUNT VII

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. W.S. KIRKPATRICK & CO., INC., DIC (HOLDING) INC., INTERNATIONAL DEVELOPMENT CORPORATION, HARRY G. CARPENTER, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, W.S. KIRKPATRICK & CO. INTERNATIONAL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON, AND R.H. EDWARDS

92. Plaintiff incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

93. By the payment of the bribes and the agreement to pay bribes to Nigerian officials in connection with the Nigerian Contract, the Defendants, and each of them, with malicious intent and without justifiable cause, improperly interfered with ETC's prospective contract relations with Nigeria.

94. Defendants' actions as aforesaid solely and proximately damaged ETC and ETC thereby suffered lost profits in the approximate amount of $3,000,000.00.

95. The actions of Defendants, and each of them, both jointly and severally, were criminal in nature, were undertaken with the intent to unlawfully benefit Defendants and were undertaken to deprive Defendants' competitors (such as ETC) of the opportunity to compete fairly for the Nigerian Contract; therefore, punitive damages should be imposed upon Defendants, and each of them, so that Defendants, and all those who learn of this conduct and any punitive damages awarded hereon, should never again engage in such conduct.

WHEREFORE, Plaintiff requests this Court to enter judgment in favor of Environmental Tectonics Corporation, International, in the amount of Three Million Dollars ($3,000,000.00), plus punitive damages, interest, costs of suit, and a reasonable attorney's fee, against each Defendant, both jointly and severally, and brings this action to recover same.

RUTTER, TURNER & STEIN

By_____
Thomas B. Rutter
872 Public Ledger Building
Independence Square
Philadelphia, PA 19106
(215) 925-9200

By_____
Alan Turner
209 Haddon Avenue
Haddonfield, NJ 08033
(609) 429-6022

Counsel for Plaintiff

THIS AGREEMENT made this 19th day of March, 82 BETWEEN ALHAJI AKANBI ONIYANGI, Minister of Defense, Ministry of Defense, Lagos, for and on behalf of the Government of the Federal Republic of Nigeria (hereinafter referred to as "Buyer") of the one part,

AND

W.S. KIRKPATRICK & CO. INTERNATIONAL, a corporation of the State of New Jersey, U.S.A. 22, Audrey Place, Fairfield New Jersey, represented by HARRY CARPENTER (hereinafter referred to as "the Seller") on the other part.

WHEREAS the Buyer is desirous of purchasing Devices and Spares for an Aeromedical Facility including a Hyperbaric Chamber system, Hypobaric (Altitude) Chamber System, vertifuge, centrifuge, and various related Equipment, including total technical services to install and operate the systems (hereinafter referred to as 'the Equipment and the Services') of the Nigerian Airforce.

WHEREAS the Buyer has requested to buy equipments and services listed in Appendix 1.

AND WHEREAS the Seller has agreed to sell the equipments and services on the terms and conditions set forth in this Agreement through the primary manufacturers, NAUTILUS ENVIRONMENTALS, INC., and EMRO ENGINEERING, COMPANY INC. on the understanding that the Buyer accepts the Seller's declaration that the Seller and its agents have no business connection with South Africa or any of its agents.

NOW THIS AGREEMENT WITNESSETH as follows:

ARTICLE 1
OBJECT OF THE AGREEMENT

1.1 This Agreement is to provide for the terms and conditions under which the Buyer shall buy from the Seller the equipments and services stated hereunder. a) Physiological Training Unit Equipment listed in Appendix 1 to this Agreement for the Nigerian Airforce aeromedical Centre, Kaduna b) Installation Assembly and Test of the Equipment c) Training of Nigerian Airforce Personnel d) Maintenance Services of the Equipment

ARTICLE II
CONTRACT PRICE

2.1 The total contract price for the equipments and services to be provided by W.S. Kirkpatrick and its sub-contractors (as provided for in Appendix l) shall be U.S. $10,835,048.75 (Ten Million, Eight Hundred and Thirty-Five Thousand, Forty-Eight U.S. Dollars, Seventy-Five Cents).

ARTICLE III
TERMS OF PAYMENT

3.1 The Buyer shall pay the sum of U.S. $10,258,515.50 (Ten Million, Two Hundred and Fifty-Eight Thousand, Five Hundred and Fifteen Dollars Fifty Cents) being the sum payable in foreign currency cut of the Contract price referred to in Appendix 1 as follows:

PAYMENT FOR EQUIPMENTS

3.2 Within forty-five days after signing of the Agreement, the Buyer shall pay the sum of U.S. $1,936,577.00 (One Million Nine Hundred and

Thirty-Six Thousand Five Hundred and Seventy-Seven Dollars) which represents 20% (Twenty percent of the total F.O.B. cost of materials and spare parts referred to in Appendix 1 of this Agreement by direct transfer to the Seller's nominated account. This down-payment shall be secured by a bank guarantee to be valid for a period of 18 (eighteen) months and furnished by the Seller to the Buyer.

3.3 Within forty five (45) days after the signing of this Agreement the Buyer shall open in favour of the Seller, an irrevocable documentary Letter of Credit for the sum of U.S. $38,321,938.50 (Eight Million, Three Hundred and Twenty-One Thousand, Nine Hundred and Thirty-Eight Dollars Fifty Cents) [sic] being the balance of the amount payable in foreign currency as specified in the foregoing paragraphs and Appendix lB annexed hereto.

3.3(i) At One Hundred and Fifty (150) days from the date of Down-Payment, a progress payment of U.S. $2,904,865.50 (Two Million, Nine Hundred and Four Thousand, Eight Hundred and Sixty Five Dollars Fifty Cents) being Thirty per cent (30%) of U.S. $9,682,885.00 (Nine Million Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars) being FOB cost of Equipments and Spare Parts shall be made against submission of Sight Draft by Kirkpatrick accompanied by approved Certificate of Valuation of work done to be issued by the Director of NAF Medical Services and Air Officer Logistics.

3.3(ii) At Two Hundred and Seventy (270) days from the date of Down-Payment, a progress payment of U.S. $1,452,432.75 (One Million, Four Hundred and Fifty-Two Thousand Four Hundred and Thirty-Two

Dollars and Seventy-Five Cents) being Fifteen per cent (15%) of U.S. $9,682,885.00 (Nine Million, Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars) being FOB cost of Equipments and Spare parts, shall be made after Hydrostatic Test on the Hyperbaric Chamber System and Hypobaric Chamber System Pressure Vessels, upon presentation of a Sight-Draft by Kirkpatrick, accompanied by an approved Certificate of Valuation of work done to be issued by the Director of NAF Medical Services and Air Officer Logistics.

3.3(iii) A further payment of U.S. $1,939,577.00 (One Million, Nine Hundred and Thirty-Six Thousand Five Hundred and Seventy-Seven Dollars) being Twenty percent (20%) of U.S. $9,682,885.00 (Nine Million Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars) being FOB cost of Equipments and Spare Parts shall be made upon presentation of a Sight-Draft by Kirkpatrick accompanied by:

a) Commercial Invoice
b) Packing List and Certificate of Origin
c) Bill of Lading
d) Certificate of SGS Inspection. The Inspection Certificate to be issued shall cover the total value of the Equipment and Spare Parts taking into account the stage of payments already made.

3.3(iv) Upon arrival of Equipment and Spare Parts at the site in Kaduna a further payment of U.S. $968,288.50 (Nine Hundred and Sixty-Eight Thousand Two Hundred and Eighty-Eight Dollars and Fifty Cents) being Ten percent (10%) of U.S. $9,682,885.00 (Nine Million, Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars)

being FOB cost of Equipment and Spare Parts shall be made upon presentation by Kirkpatrick of a Sight-Draft accompanied by:

a) Commercial Invoices
b) Bill of Lading
c) Packing List and Certificate of Origin
d) Certificate of SGS Inspection. Certificate shall cover the total value of the equipment and spares taking into account the instalmental payments already made.

3.3(v) A final payment of $484,144.25 (Four Hundred and Eighty-Four Thousand, One Hundred and Forty-Four Dollars and Twenty Five Cents) (5%) five percent of $9,682,885 (Nine Million Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars) being FOB cost of equipments and spare parts shall be made 12 (twelve) months from the date of installation and on expiration of the guarantee period upon presentation by Kirkpatrick of sight draft accompanied by Certificate of Acceptance issued by the Buyer's representatives.

3.3(vi) *PAYMENT FOR FREIGHT CHANGES*

The Buyer shall reimburse the Seller for the cost of freight charges on the equipment to Nigeria on presentation of relevant shipper's invoices.

3.3(vii) *PAYMENT FOR SERVICES*

At 120 days from date of Down Payment, a payment of Technical Services for submission of the Training plan in the amount of $134,062.50 (One Hundred and Thirty-Four Thousand, Sixty-Two Dollars, Fifty Cents) 80% (eighty per cent) of U.S. $167,578.00 (One Hundred and Sixty-Seven Thousand, Five Hundred and Seventy-Eight Dollars) being cost of training to be carried out in U.S.A shall be made

against presentation by Kirkpatrick of sight draft accompanied by Certificate issued by Buyer's representatives confirming receipt of the training plan.

3.3(viii) Upon completion of the 30 day period for training of NAF personnel in U.S.A., a payment of Technical Services of $33,515.50 (Thirty-Three Thousand, Five Hundred and Fifteen Dollars Fifty Cents) 20% (Twenty per cent) of U.S. $167,578.00 (One Hundred and Sixty-Seven Thousand, Five Hundred and Seventy-Eight Dollars) being cost of training to be carried out in U.S.A. shall be made against presentation by Kirkpatrick of sight draft accompanied by Certificate from Buyer's representatives that U.S.A. training has been satisfactorily completed.

3.3(ix) *PAYMENT FOR CRATING INLAND DELIVERY FROM FACTORY TO U.S. PORTS; INSURANCE FROM FACTORIES TO PORT; FREIGHT CHARGES*

Payment of U.S. $298,365.00 (Two Hundred and Ninety-Eight Thousand, Three Hundred and Sixty-Five Dollars) for the above charges shall be made out of the Letter of Credit on submission of Shipper's Invoice and copies of relevant commercial Invoice and Bill of Lading.

3.3(x) *PAYMENT FOR ASSEMBLY, INSTALLATION AND TEST*

The sum of U.S. $65,812.50 (Sixty-Five Thousand, Eight Hundred and Twelve Dollars, Fifty Cents) offshore being Thirty Percent (30%) of U.S. $217,735 (Two Hundred and Seventeen Thousand, Seven Hundred and Thirty-Five Dollars) for assembly, installation and test against presentation by

Seller of a Certificate duly signed by the Director NAF Medical Services and Air Officer Logistics confirming acceptance of Equipments as being assembled, installed and tested.

3.3(xi) *PAYMENT FOR MAINTENANCE SERVICES*
The sum of U.S. $43,875.00 (Forty-Three Thousand, Eight Hundred and Seventy-Five Dollars) being part payment for the Maintenance shall be paid to the Seller in foreign currency on arrival in Nigeria of the Maintenance Engineer, as shall be confirmed in a letter signed by the Director NAF Medical Services.

ARTICLE IV
PAYMENT IN MAIRA

4.1 In addition to the above payments, the Buyer shall pay a sum of U.S. $576,533.25 (Five Hundred and Seventy-Six Thousand, Five Hundred and Thirty-Three Dollars, Twenty-Five Cents) in its equivalent conversion rate in Nigeria Currency in the manner herein provided.

4.2 *PAYMENT FOR TRAINING IN NIGERIA*
Upon commencement of training in Nigeria, a sum of U.S. $50,273.50 (Fifth [sic] Thousand, Two Hundred and Seventy-Three Dollars, Fifty Cents) representing part of the total training cost as specified in Appendix 1 (c) shall be paid in its equivalent Nigerian Currency upon presentation by the Seller to the buyer of a letter from NAF Director of Medical Services and Air Officer Logistics signifying that training had commenced in accordance with the provision of this agreement.

4.3 Upon completion of the 90-day training period in Nigeria, the sum of U.S. $50,273.50 (Fifty

Thousand, Two Hundred and Seventy-Three Dollars Fifty Cents) representing the balance of payment in respect of the training cost in Nigeria as provided in Appendix I(C) to this agreement shall be paid in its equivalent Nigerian Currency on presentation by the Seller to the Buyer of a letter duly signed by the NAF Director of Medical Services and Air Officer Logistics signifying that the training had been completed in accordance with the provisions of this agreement.

4.4 *PAYMENT FOR INSTALLATION, ASSEMBLY AND TEST IN NIGERIA*

After arrival of Material at Kanduna Site, and at the beginning of installation, a payment of U.S. $43,875.00 (Forty-Three Thousand, Eight Hundred and Seventy-Five Dollars) being Twenty Percent (20%) of payment for assembly, installation and test shall be paid in Nigeria in its equivalent Nigerian Currency by the Seller on presentation of a Certificate signed by the Director of Medical Services and Air Officer Logistics that the equipments have been deposited in Kaduna, and installation was to commence.

4.5 Upon assembly, installation and test of the equipments, a payment of U.S. $109,687.50 (One Hundred and Nine Thousand, Six Hundred and Eighty-Seven Dollars Fifty Cents) shall be paid in its equivalent Nigerian Currency against presentation by the Seller of a Certificate from the Buyer confirming acceptance of the equipment as being assembled, installed and tested.

4.6 The part payment as the sum of U.S. $102,375.00 (One Hundred and Two Thousand, Three Hundred and Seventy-Five Dollars) for maintenance Services as contained in Appendix 1 shall be paid in the

equivalent Nigerian Currency in three installments as follows:

(i)	US $20,475	in advance
(ii)	US $40,950	at the 181st (One Hundred and Eighty First) day
(iii)	US $40,950	on the completion of the Maintenance.

The second and third installments shall be made after certification by NAF Director of Medical Services and the Air Officer Logistics that the Maintenance Services have been performed satisfactorily.

PAYMENT IN NIGERIA FOR INSURANCE PORTS HANDLING CHARGES AND LOCAL TRANSPORT CHARGES TO SITE

4.7 A payment of the equivalent of $149,718.75 (One Hundred and Forty-Nine Thousand, Seven Hundred and Eighteen Dollars, Seventy-Five Cents) shall be paid in Naira in Lagos against submission of Bills and Receipts and Invoices by Ben-Reubens (Nig) Ltd. to the Buyer covering insurance from USA To Lagos, and insurance from Lagos to Kaduna, all coverage provided by NICON. If the actual insurance cost is higher than $149,718.75 (One Hundred and Forty-Nine Thousand, Seven Hundred and Eighteen Dollars, Seventy Five Cents) the full cost shall be reimbursed to Ben-Reubens (Nig) Ltd. as certified by NICON.

4.8 A payment of the equivalent of $70,330.00 (Seventy Thousand, Three Hundred and Thirty Dollars) shall be paid in Naira in Lagos against submission of invoices receipt Bills etc. by Ben-Reubens (Nig) Ltd. to the Buyer covering unloading charges in the port of Lagos plus motor transport to Kaduna.

ARTICLE V
SUBMITTALS OF DOCUMENTATIONS

5 The parties agree that an integrated delivery schedule is necessary to insure that the work proceeds in a timely manner. The Seller agrees to submit, or has submitted documentation necessary to fulfill this Agreement as follows:

A.	Arrangement of Equipment	Submitted 3/23/82
B.	Critical Dimensions	Submitted 3/23/81
C.	Structural General	Submitted 3/23/81
D.	Electrical Requirements (preliminary)	Submitted 3/23/81
E.	Water Requirements (preliminary)	Submitted 3/23/81
F.	Connection to building utilities	Contract + 60 days
G.	Compressed Air Piping	Contract + 60 days
H.	Medical Gas Piping	Contract + 60 days
I.	Vacuum System Piping	Contract + 90 days
J.	Equivalent Foundation Details	Contract + 60 days
K.	Equivalent Installation Drawings	Contract + 90 days
L.	Manufacturers Schedule of Events/Progress	Contract + 75 days
M.	Testing Schedule	Contract + 150 days
N.	Electrical Requirements	Contract + 60 days
0.	Water Requirements	Contract + 60 days
P.	Training Plan	Contract + 120 days
Q.	Itemized Spare parts data	Contract +60 days
R.	Installation Schedule	Contract +150 days

ARTICLE VI
SITE INSPECTION

6 Approximately 150 (One Hundred and Fifty) days after award of contracts two (2) representatives of the Buyer shall in company with the Seller's representative, visit the major manufacturers' site to view contractual progress. During this visit, they shall inspect and certify the state of production progress of major manufacturers (NAUTLIUS AND EMRO), shall certify the physical presence of production materials, the placement of purchase orders, the state of engineering drawings and materials, and visit new sub contract work sites. Said representatives must have authority to issue approval certificate to enable the prime contractor to receive 150 (One Hundred and Fifty) days progress payment. At approximately 270 (Two Hundred and Seventy) days from date of contract, a representative of the Buyer shall visit NAUTLIUS in HOUSTON, TEXAS, U.S.A., to witness the hydrostatic test of the Hyperbaric Chamber System and Hypobaric pressure vessels. Said representative must have authority to issue approval certificate to enable contractor to receive 270 (Two Hundred and Seventy) days progress payment.

ARTICLE VII
TAXES, PERMITS AND FEES

7 The Seller's prices as set forth in Article iii hereof exclude all taxes such as, but not limited to, local, state or federal including those incurred by sub-vendors, or materials incorporated in the WORK, and also exclude the cost of the fees, for all permits, licenses and registrations, duties, import fees, inspection including but not limited to those

performed by the Societe General de Surveillance S.A. on behalf of the Federal Republic of Nigeria, harbour fees or demurrage whether special or general, which may be required for any of its sub-contractors by the Federal Government of Nigeria, and/or by any state of municipal governmental body, to the extent such taxes, costs, duties or fees apply to the WORK. The Seller shall not be responsible for payment of any such fees. The Seller shall assist the Buyer by making all necessary information and documentation in its possession available for applications for processing and obtaining all such permits, licenses etc. Airport duty free certificates should be issued by buyers to sellers.

7.2 All taxes, duties, dues, charges and levies outside the Federal Republic of Nigeria to which the Seller is liable in connection with the contract shall be borne by the Seller.

ARTICLE VIII
CONFIDENTIALITY

8 All drawings, specifications, data, manual and similar material or copies thereof furnished by the Seller to the Buyer shall remain the confidential property of the Seller and shall not be shown or permitted to be shown, copies or permitted to be copied or disclosed to third parties for a period of five (5) years from the Date of Acceptance by the Buyer of the WORK, and use thereof shall be restricted solely to operation and maintenance purposes by the Buyer and its employees.

ARTICLE IX
AVAILABILITY OF SITE

9.1 The Buyer shall erect and provide at its sole cost and expense the building and interfacing services which will house the systems to be supplied by the Seller. The parties recognise [sic] that it is essential for the timely delivery by the seller that the building be available to receive the systems when the systems are delivered to Nigeria. In the event that the buyer fail to provide access to the building the seller shall be entitled to invoke the Force Majeure provisions of this contract and, in addition, any and all costs.

ARTICLE X
DELIVERY

10.1 Delivery shall commence 26 (twenty-six) weeks after the date of signing of the Agreement and shall be completed about 54 (fifty-four) weeks from the commencement of the Agreement.

ARTICLE XI
TRAINING

11.1 The Seller shall conduct operational (functional user) training for 7 (seven) NAF personnel, 2 (two) electronic technicians, 2 (two) electricians and 3 (three) medical personnel for 30 (thirty) days in the U.S.A. Emphasis during the training shall be on safety adherence to procedure and emergency action. The Seller shall also conduct maintenance course on all the equipments for NAF personnel in Nigeria for a period of at least 90 (ninety) days. The Buyer shall bear the cost of tickets of trainees while the Seller shall provide subsistence.

ARTICLE XII
BREACH

12 In the event that either party shall commit or permit a breach of any material part of this Agreement, the other party shall have the right to terminate the Agreement by notice in writing to the part in default PROVIDED that if such party shall make good the breach to the satisfaction of the other within sixty (60) days after, such notice shall be deemed to be void and of no effect.

ARTICLE XIII
MARKINGS

13 The boxes containing the equipment and spares being imported under this agreement shall be marked as follows:

The Permanent Secretary,
Ministry of Defence,
P.M.B. 12590,
LAGOS, NIGERIA.
(NIGERIAN AIR-FORCE AEROMEDICAL CENTRE EQUIPMENT)

ARTICLE XIV
GUARANTEE

14.1 The Seller guarantees the good functioning of the equipment supplied hereunder for a period of twelve (12) months from the date of installation.

14.2 If any of the goods supplied by the Seller is found to be defective as a result of the material used or bad workmanship within a period of twelve (12) months from the date of installation the Seller shall at their own expense replace in whole or repair the goods.

14.3 The Seller also guarantees for the same period mentioned in this Article against any defects or damage except those attributable to the Buyer or his agents.

14.4 Any goods replaced under this Article shall have its guarantee period extended by twelve (12) months from date of replacement.

ARTICLE XV
GUARANTEE OF AVAILABILITY OF SPARES AND ACCESSORIES

15 Seller hereby undertakes to guarantee supply to the Buyer of fast moving spare parts. In addition, Seller guarantees availability of spare parts for the first ten (10) years immediately following the completion of delivery of the systems and other equipments.

ARTICLE XVI
WARRANTY

16 The Seller shall assign to the Buyer any and all warranties that it shall receive from the primary manufacturers. The Seller warrants that the systems and Equipment furnished pursuant to this contract shall be in good working order and made of first class materials. This warranty shall cover workmanship and be valid thirty (30) calendar months from date of the execution of this Agreement but in no case longer than a period of twelve (12) months from the date any item of Equipment is installed and placed into service by the Buyer. This warranty shall not be extended and shall not be subject to extension by reasons of Force Majeure.

ARTICLE XVII
PATENTS

17 The Seller shall indemnify, hold harmless and defend the Buyer from and against any and all suits, legal proceedings, claims, royalties, license fees, demands, damages, costs and attorneys' fees incident to any infringement or to any claimed infringement of any United States patent by the equipment or apparatus per sold by the Seller hereunder; PROVIDED (a) prompt written notice by the Buyer is given to the Seller as soon as the Buyer acquires knowledge of any such suit, proceedings, claim or demand and an opportunity be afforded the Seller to settle or defend the same in such manner as the Seller deems advisable and (b) the same may be defended or settled in the Buyer's name, if necessary, and (c) every reasonable assistance which the Seller requires in so defending or settling shall be rendered to the Seller by the Buyer, and (d) this covenant to indemnify is not intended and does not apply to any process used by the Buyer nor to any product produced by the Seller which is outside this Agreement. In the event that the said Equipment or apparatus is, in any suit, held to constitute an infringement and as a result the use thereof is prevented, then the Seller, if unable within a reasonable time to secure for the Buyer the right to continue using the said Equipment or apparatus, either by suspension of the injunction or by securing for the Buyer a license or otherwise, shall at its own expense either replace the said Equipment or apparatus with non-infringing Equipment or apparatus, or modify the said Equipment or apparatus so that the same becomes non-infringing.

ARTICLE XVIII
FORCE MAJEURE

18 Should either party to this Agreement fail to comply with any of the provisions herein contained by reason of Force Majeure, such failure should not be regarded as a breach of such provisions of the Agreement. For the purpose of this agreement, Force Majeure shall be construed as events, or circumstances beyond the control of either party, unforeseen and unavoidable including acts of God, or war, revolution, fires other than caused by negligence of the seller, extraordinary floods, epidemics, quarantine restrictions, national strikes arising after the coming into force of this Agreement which prevents the implementation of the obligations either totally or partially. The party claiming Force Majeure shall inform the other party in writing within thirty (30) days of the commencement of Force Majeure. Force Majeure shall automatically extend the terms of this Agreement by the duration of the Force Majeure. If Force Majeure continues for a period of three (3) months, the parties shall hold consultations regarding the appropriate stops to be taken to achieve the purpose of this Agreement.

ARTICLE XIX
DEFAULTS AND DAMAGES

19 In the event that either party shall default in the performance or payments required under this Contract, with the exception of the Force Majeure clause of this Agreement, and such default is not cured within forty-five (45) days of receipt of written notice of such default, the party in default shall be entitled to recover its direct damages by such default,

which damages shall not include any claim for loss of profits or consequential damages.

ARTICLE XX
APPLICABLE LAW

20 This Agreement shall be governed, interpreted and controlled by the laws of the Federal Republic of Nigeria and English shall be the official language.

ARTICLE XX
ARBITRATION

21 In the event of any dispute between the parties hereto arising out of this contract, the Buyer and the Seller hereby undertake to use their best endeavors to reach an amicable settlement, failing which it is agreed that the matter shall be submitted to an Arbitration Court convened under the rules as provided under the Arbitration Laws of Nigeria, 1958, Laws of the Federal Republic of Nigeria (Cap. 13).

ARTICLE XXII
INSURANCE

22 The Seller shall obtain all other insurance required hereunder and furnish evidence of such insurance to the Buyer as its interest may appear. The Seller shall not permit any sub-contract from the Seller until evidence of an insurance required of the sub-contractor has been furnished to the Buyer.
The following insurance coverage shall be provided by the Seller:

A. Workmen's compensation, occupational disease and employer's *liability*.

Evidence of adequate insurance coverage under a policy complying with the laws of Nigeria Covering Workmen's compensation.

B. *Automobile Liability*
Evidence of insurance coverage complying with the limits of liability required by Nigerian Law. Such policy shall be purchased in a company allowed to carry on insurance business in Nigeria.

C. *Comprehensive General Liability*
Minimum liability limits of $1,000,000 (One Million Dollars) each single limit, each concurrence for Bodily injury and Property Damage combined.

ARTICLE XXIII
SUB-CONTRACTING

23.1 The Seller shall be entitled to sub-contract the clearance of the equipments from the Nigeria Ports and the insurance of same from USA ports to site, and transportation of all items to the site to its local representative Ben-Reubens (Nig) Ltd., 8/10 TOMOLOJU ESTATE, OGBA, P.M.B. 21562, IKEJA, LAGOS, but shall nevertheless bear full responsibility and other obligations for the proper implementation of the said part of the Agreement.

23.2 The Seller may sub-contract part of any WORK undertaken in this Agreement to one or more responsible sub-contractors of the Seller's choice, provided the seller shall provide the Buyer with a list of all approved sub-contractors. A list of the nature of the WORK to be to be performed by the said sub-contractor(s) in each case shall be provided by the Seller to the Buyer in advance of any performance or work by such sub-contractor. Nothing herein

contained shall in any manner limit the responsibility of the seller for the acts of any sub-contractor notwithstanding any acceptance of sub-contractors by the Buyer.

ARTICLE XXIV
ENTIRE UNDERSTANDING

24. All oral and written negotiations relating to the subject of this Agreement are merged herein, and this Agreement supercedes all prior Agreements, Memoranda, discussions discussions and negotiations with respect to such subject matter.

ARTICLE XXV
NOTICES

25.1 Any notice required to be given or otherwise desired to be given by one party hereto to the other party hereto, shall be effective if given, in writing, by telegram or by mail, postage prepaid, in the case of notice to the Buyer's address:

The Permanent Secretary,
Ministry of Defense,
P.M.B. 12590,
Lagos,
Nigeria.
(Nigerian Airforce Aeromedical Centre)

25.2 And in the case of the Seller addressed:

W.S. Kirkpatrick & Co. International,
22 Audrey Place,
Fairfield, New Jersey, USA

or to such other address as may be communicated in writing by one part to the other.

25.3 Such notices sent by airmail shall be considered delivered and becomes effective on the fifteenth (15th) day after the date of mailing thereof. Notices by cablegrams or telex shall be considered delivered and becomes effective upon sending thereof.

ARTICLE XXVI
SEVERABILITY

26 Each paragraph and every provision of each part of each paragraph of this Agreement shall be independent of the other, and in the event that any paragraph shall be judged to be illegal or contrary to public order, the said illegality shall not affect the other parts of this Agreement and the provisions of this Agreement shall remain valid, binding and executory.

ARTICLE XXVII
HEADINGS

27 The division of this Agreement into paragraphs and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

ARTICLE XXVIII
DATE OF COMPLETION

28 The date of completion shall be that date upon which the Buyer indicates to the Seller its acceptance of the systems and related equipment and the Buyer certified by certificate of acceptance his acceptance of the systems and equipments after installation.

ARTICLE XXIX
TERMINATION OF CONTRACT

29 Either party shall have the right to terminate this Agreement if the delivery of the goods, for the reasons mentioned in Article Force Majeure, is delayed, or on reasonable grounds can be expected to be delayed for more than twelve (12) months. The costs already incurred by the parties towards the implementation of this Agreement shall then be determined and apportioned through Arbitration, failing amicable settlement. Notice of termination of the Agreement shall be given in writing. If there should be any possibility of selling the items, proceeds from such a sale shall be deducted from the above mentioned costs.

ARTICLE XXX
COUNTERPARTS

30. This Agreement may be executed in one or more counterparts, each of which will constitute valid and binding obligations upon the parties hereto.

ARTICLE XXXI
ENTRY INTO FORCE

31. This Agreement shall become effective on the date of signature by both parties.

IN WITNESS WHEREOF the parties hereto have hereunder affixed their hands and seals the day and year first above written:

SIGNED SEALED AND DELIVERED

by the said Alhaji Akanbi Oniyangi Minister of Defence, Ministry of Defence, Lagos for an on behalf of the Government of the Federal Republic of Nigeria.

In the Presence of:

SIGNED SEALED AND DELIVERED

By the said HARRY CARPENTER for and on behalf of W.S. Kirkpatrick & Co. Inc.

In the presence of:

Systems Material	*Base Price FOB FACTORY*	*Spares FOB FACTORY*	*Total Price FOB FACTORY*
Hyperbaric Chamber System	$3,252,946	$299,214	$3,552,160
Hypotaric (Altitude) Chamber	2,746,710	252,578	2,999,288
Environmental Monitering Enclosure Equipment	143,223	13,193	156,416
Helmet Storage, Repair and Cleaning Room Items	8,177	753	8,930
Night Vision Illusion Trainers	51,342	4,730	56,072
Pressure Breathing Trainer Consoles	18,316	1,687	20,003
Oxygen Denitrogenation Consoles	11,647	1,073	12,720
Parachute Landing Fall Trainer	89,851	8,277	98,128
Parasail Training Equipment	76,251	7,025	83,276

Systems Material (Cont.)	*Base Price FOB FACTORY*	*Spares FOB FACTORY*	*Total Price FOB FACTORY*
Model 2015-SP Human Centrifuge	1,653,648	151,420	1,805,068
Model 2200 Vertifuge II	511,261	47,099	558,360
Somatagyral Servo Turntable	71,446	6,582	78,028
Ejection Seat Trainer	233,028	21,408	254,436
MATERIALS TOTALS FOB FACTORY	$,8,867,846	$815,039	$9,682,885

TECHNICAL SERVICES	*Total Amount*	*Amount Payable Offshore*	*Amount Payable In Naira*
Installation, Assembly and Test	$219,375	$65,812.50	$153,562.50
Training - See Schedule B & D 167,573 to be paid in U.S. Dollars 100,547 U.S. Dollars to be paid in Naira			
Maintenance Services - one year See Schedule B and E	$ 146,250	$ 43,875	$102,375

TECHNICAL SERVICES (Cont.)	*Total Amount*	*Amount Payable Offshore*	*Amount Payable In Naira*
PLUS: Crating, Inland Delivery from factories to port, insurance from factories to port, and ocean freight and forwarding charges from USA to Lagos, Nigeria. These are test estimated prices, but payament will be made against actual invoices		298,365	
Insurance Ports handling charges, Transportation to site Following charges to be paid in Nigeria in Naira to firm of Ben-Reubens (Nig.) Ltd.			

TECHNICAL SERVICES (Cont.)	*Total Amount*	*Amount Payable Offshore*	*Amount Payable In Naira*
l) Unloading charges, clearing and motor transport to Kaduna		70,330	70,330
2) Insurance f rom port to USA to site in Kaduna (NICON's Estimate)	149,718.75		149,718.75
TOTAL VALUE OF CONTRACT	$10,835,048.75		
$10,258,515.50 to be paid in U.S. Dollars			
U.S. Dollars to be paid in Naira	576,533.25		

SUMMARY
Details of Service Charges

(i)	Installation, Assembly and Test	$	219,375.00
(ii)	Training (a) Payable in U. S . Dollars	$	67,578.00
	(b) Payable in Naira equivalent	US $	100,547.00
(iii)	Maintenance Services	$	146,250.00
(iv)	Crating and Inland	$	298,365.00
(v)	Unloading Charges etc .	$	70,330.00
(vi)	Insurance (Payable in Naira Equivalent	$	149,718.75
	Total	$	1,152,163.75
FOB cost of Equipment and Spare Parts		$	9,682,885.00
			$10,835,048.75

In Words (Ten Million, Eight Hundred and Thirty Five Thousand Forty Eight Dollars, Seventy Five Cents).

1.	Value of Contract payable in U.S. Dollars	$10,258,515.50
2.	Value of Contract payable in Naira Equiv.	$ 576,533.25
	Total Value of Contract	$10,835,048.75

APPENDIX IB

ARTICLES OF AGREEMENT	*PAYMENT IN FOREIGN CURRENCY BY IRREVOCABLE LETTER 0F CREDIT SCHEDULE OF PAYMENT*
3.3 (i)	US $2,904,865.50
3.3 (ii)	US $1,452,432.75
3.3 (iii)	US $1,936,577.00
3.3 (iv)	US $ 968,288.50
3.3 (v)	US $ 484,144.25
3.3 (vi)	US $ 131,062.50
3.3 (vii)	US $ 33,515.50
3.3 (viii)	US $ 298,365.00
3.3 (ix)	US $ 65,812.50
3 3 (x)	US $ 43,875.00
	$8,321,939.50

APPENDIX IC

PAYMENT IN NAIRA SCHEDULE OF PAYMENT

ARTICLES		
4 1	Naira Equivalent	US $ 50,273.50
4 ii		$ 50,273.50
4 iii		$ 43,875.00
4 iv		$ 109,687.50
4 v		$ 102,375.00
4 vi		$ 149,718.75
4 vii		$ 370,330.00
	TOTAL	$ 576,533.25

APPENDIX 2
MAINTENANCE SERVICE

I. *GENERAL*

To ensure continued and efficient operation of the deliverable systems following Buyer's acceptance, a maintenance technician shall remain on-site for a period of twelve (12) months.

A. *Duties and Responsibilities*

The on-site technician shall perform as a technical advisor to the Buyer. His primary duty and responsibility shall be to advise and assist the Buyer in matters of system performance where safety and maintenance are involved. Under the administration control and authority of the Buyer he shall:

1. be responsible to assist in the implementation and continued execution of the preventative maintenance programme.

2. be responsible to notify the Buyer of any unsafe or hazardous condition encountered, including but not limited to:

   a. operational procedures

   b. the introduction of potentially toxic substances pressure vessels

   c. erratic equipment operation suggesting the necessity for corrective action.

3. be responsible to assist in the execution of an on-going maintenance training program for buyer's personnel

4. be responsible to advise the buyer regarding areas of possible improvement such as:

   a. operational procedures

   b. safety procedures

   c. maintenance procedures

B. *Reporting*
The on-site maintenance technician works under the administrative control and authority of the Buyer. Nevertheless, he remains the seller's employee and retains his responsibility to it as its employer. In this regard he shall:

1. Submit a weekly activity report

2. Submit copies of all memoranda or other written data submitted to the buyer as occurring

3. take no action, make no commitments and enter into no agreements with the buyer which are beyond the scope of his authority.

C. *Conditions of Service*
The following conditions of service shall apply:

1. The on-site maintenance representative is expected to remain in the country for one (1) year period of time. However, illness, an emergency or other conditions may require a shorter presence. In this event, the seller shall ensure his replacement is fully capable of relief and shall if possible, ensure an

acceptable dual presence period for continuity purposes.

2. The on-site maintenance technician is under contract to provide an advisory and assistance service. He is not authorized to make unilateral decisions on behalf of the buyer nor accept liability for actions outside the normal scope of his defined activity.

3. The buyer must recognize and accept that on-site maintenance activities shall require the services of more than one individual. In this regard it shall be his responsibility to provide for additional personnel as may be required. Alternatively, and if desired, the seller shall provide for complete on-site maintenance services under mutually agreed contract.

4. The buyer shall be responsible for arranging visa, clearance for the maintenance and technical personnels with His Excellency, Consulate General of Nigeria.

General

Installation assembly and test of the systems delivered is one of the more important aspects of the contractual activity; however, at this time one of the least well defined. We are totally confident that all deliverable items are properly configured to interface with the Aeromedical Centre building but recognise the requirement for firm and detailed interface between ourselves and the building contractor to plan all installation, assembly and test requirements for a smooth and orderly flow of events.

In addition to sequential planning in this regard, each party needs to be totally aware of where their responsibilities begin

and end. During the building construction phase there shall undoubtedly be actions which can be accomplished to facilitate case of installation of the equipment. Likewise, we must be sensitive to the building schedule to ensure deliverables may be landed into their respective foundation sites and not impede construction activity.

Throughout these specifications great care has been paid to define the deliverables and the responsibilities. However, the systems to be delivered are complex and final design actions shall undoubtedly raise additional questions. We are confident that by establishing an attitude of mutual respect and co-operation the installation, assembly and test phase can be accomplished in an effective trouble free manner.

A. *Personnel*

The various equipment manufacturers providing equipment under the terms of this contract shall furnish the necessary personnel in country to effect the installation assembly and test activities.

B. *Materials*

We have not included installation materials as a portion of the fixed price quotation. To do so at this time is not possible. Material requirements shall be defined as the programme unfolds and at such times as the building contractor provides building drawings and utility stubs and detail design drawings are completed. For Budgetary purposes, we would suggest the building contractor include the sum of $150,000 (one hundred and fifty thousand U.S. dollars) in their figures for such materiais. Where feasible and advantageous, we can provide defined materials when fully identified.

C. *Assistance*

Referred to elsewhere in these specification

D. *Test Procedure*

In accordance with the test schedule to be prepared, the seller shall present for test all systems specified in this document. The acceptance test shall be conducted within 24 hours (twenty four hours) of presentation of readiness and all systems and their components shall be tested to meet represented specification. Upon satisfactory completion of said test the buyers representative shall certify his acceptance of all systems. Should exceptions to satisfactory test performance be noted, it shall be the manufacturer's responsibility to rectify the problem and again present for acceptance that system, sub-system or component previously found to be unsatisfactory.

SCHEDULE EVENTS

Installation, assembly and test activity is a continous evolution whereby deliverable systems are interfaced into a facility and thence prepared for full operation. The schedule of events are generally as follows and percentile of overall time and cost factors as presented.

A. *INSTALLATION*

Phase One

The Aeromedical Laboratory contractor selected by the Buyer shall be responsible to physically prepare the building for acceptance of all contracted deliverables in accordance with detailed and itemised drawings and instructions provided by the seller. In this regard, he shall provide all foundations; anchor bolts, levelling plates - electrical motor startors, circuit breakers, junction boxes, conduits and stuffing glands - piping and valves and water and

electrical connection points not an integral portion of the constructed deliverable systems.

Phase Two
The buyer shall be responsible for the provision of labour and equipment for unloading, unpacking, erection and installation of deliverable equipment into his designated and prepared building location. During this phase, the seller's installation Supervisor shall be provided to directly supervise inspect and verify activity safety and accuracy and document any damages which may have occurred during shipment or handling.

Phase Three
The seller shall be responsible to secure all deliverable equipment to its prepared building attachment points (foundation anchor points, levelling plates and connection points).

B. *Assembly*
During assembly activity the installation, assembly and test team shall physically interconnect all equipment deliverables as applicable. In part, such activity shall consist of such items as:

1. interconnect and assemble hypobaric system vacuum piping and manifolds,

2. interconnect and assemble hypobaric system air compressor-systems,

3. interconnect and assemble hypobaric system control consoles,

4. interconnect centrifuge to its parent control console

5. etc -

Note: The assembly activity is that evolution whereby all equipment deliverable are brought together to perform their design task.

C. *Test*

Phase one - during test operations all systems are thoroughly checked out by such action as:

1. circuit electrical continuity tests

2. piping flow tests

3. vacuum system leat tests

4. fire supression system deluge activation and flow test

5. vertifuge and centrifuge rotation and stability tests

6. analog and digital measurement accuracy tests

7. training device operational performance test

8. integrated system performance tests

Phase two - present all systems (individually) for acceptance test by the Nigerian Air Force designated representative.

EMRO ENGINEERING COMPANY, Inc.

POST OFFICE BOX 536 • SUMMIT, NEW JERSEY 07901 U.S.A •
201-772-5003

December 10, 1981

Headquarters, Nigerian Air Force
Ministry of Defense
Lagos, NIGERIA

Attn: Gp. Cpt. Isaac A. Odeh
Director of Medical Services

Gentlemen:

It is our understanding that William Mitchell, President of Environmental Tectonics Corp. (ETC), Southampton, Pennsylvania, U.S.A., has recently visited your goodselves, and possibly other NAF personnel, and has alleged that the Emro products currently under consideration for procurement by NAF (i.e. Emro Model 2200 Vertifuge, Emro 2015-SP Centrifuge, and Somatogyral Turntable) are the products of ETC!

If our understanding is correct, and Mitchell has indeed made such representations, then we must inform you that he is categorically lying to you and is attempting to interfere with and disrupt our business in a highly fraudulent manner. We would hope that our information is wrong. However, there is some possible validity in the matter because Emro terminated ETC as its sales representative in November 1980, when we discovered ETC to be misrepresenting itself as designer and manufacturer of Emro products in addition to other dishonest conduct. They have continued to do so and we therefore have instituted legal proceedings to restrain ETC from continuing such fraud.

As you are aware, the good firm of W.S. Kirkpatrick & Co., Int'l. are now our authorized sales representative in Nigeria.

Please let me assure you that the Emro products named above were originated, designed, and are produced by and for Emro exclusively. They are proprietary products of Emro.

ETC has never designed or built a human centrifuge nor have they ever built a disorientation trainer. And, they can no longer offer or sell Emro products.

You may be interested to know that we have just completed and shipped a VERTIFUGE to the Republic of Singapore Air Force, and we are presently completing an Emro 2015-SP Human Centrifuge for the Canadian Armed Forces. In addition to the VERTIFUGE we also supplied a Somatogyral Turntable to the Singapore Air Force.

I do hope the above will serve to clarify and correct any falsification of the truth.

Sincerely,

Robert W. Ruppert, P.E.
President

RWR:mg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	)	Civil Action No. 86-796HJS
v.	)	
W.S. KIRKPATRICK, INC., *et al.*	)	

CERTIFICATE OF SERVICE

ALAN TURNER, ESQUIRE, hereby certifies that a copy of the within Amended Complaint was served upon the following persons by placing a copy of same in the United States Mail, postage prepaid, on Friday, July 11, 1986:

Thomas H. Sear, Esquire
Rhonda D. Orin, Esquire
Spengler, Carlson, Gubar, Brodsky & Frischling
280 Park Avenue
New York, New York 10017

Lawrence S. Horn, Esquire
Sills, Beck, Cummis, Zuckerman,Radin, Tischman & Epstein
33 Washington Street
Newark, New Jersey 07102-3197

Theodore V. Wells, Jr., Esquire
Kelley Newton, Esquire
Lowenstein, Sandler, Brochin, Kohl,
Fisher, Boylan & Meanor
65 Livingston Avenue
Roseland, New Jersey 07068

RUTTER, TURNER & STEIN

By _____
Alan Turner

LAW OFFICES

RUTTER, TURNER & STEIN
209 HADDON AVENUE
HADDONFIELD, NEW JERSEY 08033

(609) 429-6022

ALAN A. TURNER
NEW JERSEY RESPONSIBLE ATTORNEY

July 25, 1986

Mr. James Placke
Paul, Hastings, Janofsky & Walker
Twelfth Floor
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5331

TRANSMITTED VIA TELECOPIER

Re: Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co., *et al.*

Dear Mr. Placke:

We represent Environmental Tectonics Corporation, International ("ETC") in connection with a civil lawsuit for damages stemming from ETC's failure to be awarded an aeromedical supplies and construction contract with the Republic of Nigeria in 1982. The contract was awarded to W.S. Kirkpatrick on March 19, 1982 and, we understand, was partially, but not completely performed by Kirkpatrick thereafter, even though the Republic of Nigeria appears to have paid $8,800,000 to Kirkpatrick.

The basis for ETC's suit is that Kirkpatrick and its then Chief Executive Officer Carpenter agreed to bribe certain Nigerian officials through the agency of one Benson "Tunde" Akindele, a Nigerian national who resides in London. Both

Kirkpatrick and Carpenter have been prosecuted by the United States government in criminal proceedings occurring in the District of New Jersey. Both Kirkpatrick and Carpenter pled guilty and have now been sentenced for violations of the Foreign Corrupt Practices Act. Enclosed is a copy of a document entitled "Offer of Proof" which was signed by Kirkpatrick's lawyer and was filed with the United States District Court in connection with the criminal proceeding against Kirkpatrick. This Offer of Proof sets forth a summary of the facts as then known to the United States prosecutors.

Kirkpatrick has raised the Act of State Doctrine as a defense to this civil action. Under the Act of State Doctrine, a United States Court is sometimes precluded from inquiring into the actions of a foreign sovereign where such inquiry might have an impact upon the relationship between the United States and that foreign sovereign. The Act of State Doctrine was judicially created so that a United States Court would not act on a matter more properly allocated to the Executive Branch of the United States and has been applied in instances where the foreign government is not a party to the civil action.

Although we believe the Act of State Doctrine not to have proper application to the facts of this case, we also believe, should the Republic of Nigeria state that it has no objection to this private litigation in the United States between these two American companies, the Court would certainly then not prevent this suit from going forward. If the Republic of Nigeria would indicate that ETC's prosecution of this lawsuit would not have any impact whatsoever upon the relationship between the United States and the Republic of Nigeria, the act of state claim could be finally laid to rest.

We would very much appreciate your assistance in securing an appointment with the appropriate Nigerian officials, either at the Embassy in Washington, D.C., or in Lagos, Nigeria, with whom to discuss this problem and, we hope, secure the assistance of the Nigerian government mentioned above.

With thanks in advance for your cooperation.

Sincerely,

RUTTER, TURNER & STEIN

By s/s Thomas B. Rutter
Thomas B. Rutter

TBR: kad

Enclosure

A-124

LAW OFFICES

RUTTER, TURNER & STEIN
872 PUBLIC LEDGER BUILDING
INDEPENDENCE SQUARE
PHILADELPHIA, PENNSYLVANIA 19106

(215) 925-9200
TELECOPIER (215) 925-1553

July 31, 1986

H.E. Ambassador Ignatius C. Olisemeka
Embassy of Nigeria
2201 M Street, N.W.
Washington, D.C. 20037

Your Excellency:

At the suggestion of Minister-Counselor Simeon A. Adekanye, whom I had the pleasure of meeting at the Embassy this morning, I submit herewith a brief chronology relating to a certain contract between the Republic of Nigeria and W.S. Kirkpatrick & Co., Inc. and its parent corporations.

I submit this chronology, and had the pleasure of the visit with your Minister-Counselor, so as to request a declaration, in such form as your government may see fit, that the Republic of Nigeria has no objection to the continued prosecution of a civil lawsuit presently pending in the United States District Court for the District of New Jersey wherein my client, Environmental Tectonics Corporation, has brought suit against Kirkpatrick on the ground, principally, that Kirkpatrick obtained the contract mentioned in the preceding paragraph by the payment of $1,764,019.58 (more or less), directly or indirectly, to officials of the Republic of Nigeria in 1982/1983, which acts were admitted by Kirkpatrick and its then President,

Harry Carpenter, to have been a violation of the American Foreign Corrupt Practices Act in the course of criminal proceedings against them in the United States District Court for the District of New Jersey.

The purpose of the lawsuit instituted by my client is to recover the profits it lost by virtue of being deprived of the opportunity to supply to Nigeria the facilities and services encompassed by the contract wrongfully obtained by Kirkpatrick. We have taken the position at all times — that not only was our client victimized by the acts of Kirkpatrick but, also, the Republic of Nigeria and its people were likewise victimized.

Accordingly, we request a declaration from the Republic of Nigeria both to the effect mentioned above and to the effect that the prosecution of this civil action in the American Federal Courts will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America. The purpose of such declaration would be to nullify the Kirkpatrick companies' argument in our Federal Court matter that the Court should not hear this case, or discover the facts pertaining to Kirkpatrick's activities, since to do so would involve an allegedly improper inquiry into the official acts of the Republic of Nigeria. (This defense goes under the rubric of the "act of state" doctrine in American law.)

As I told your Minister-Counselor, I should be pleased to supply such additional detail concerning this matter as is permitted in view of the fact that Kirkpatrick has caused a cloak of confidentiality to be placed over all of its acts in the Federal Court. For example, both I and appropriate representatives of my client would be pleased to meet with you or such person as may be designated for the purpose of a further review of the facts whether such meeting should be scheduled in the United States or in the Republic of Nigeria.

In any event, I thank you for the attention you have given this matter and, more particularly, I am grateful for the

courtesies extended to me by Mr. Adekanye and his associate during our meeting today.

Respectfully,

RUTTER, TURNER & STEIN

BY s/s Thomas B. Rutter
Thomas B. Rutter

TBR: rmd
Enclosure

RUTTER, TURNER & STEIN

CHRONOLOGY

On or about February 2, 1981, it was disclosed that the Air Force of the Republic of Nigeria was contemplating the purchase of physiological training equipment for use at the Aero Medical Center at Kaduna Air Force Base.

On or about February 13, 1981, Environmental Tectonics Corporation submitted *pro forma* pricing information to its agent, British Films Limited, for transmittal to Nigeria.

At or before that same time, Harry G. Carpenter, then President of W.K. Kirkpatrick, held meetings with Benson H. "Tunde" Akindele and Alhaji A. Ringam in which, according to Mr. Carpenter's memorandum of March 30, 1981 the following occurred:

> "At the first meeting with Benson Akindele, we spent all of the necessary time giving him all of the massive technical brochures that we brought with us. Everything was explained in complete detail, and he was completely satisfied. It was simply left that there would probably be required a trip to Lagos by myself or someone from Kirkpatrick, plus Saxon and Ruppert, at some point in April or early May to finalize technical questions.
>
> "We then got into the pricing, and we told Benson that his cost or the cost that Kirkpatrick was proposing approximated $7,525,000 (actually Ross and I had worked up an FAS packed for export quotation from all three manufacturers of $6,543,655, and then had added a 15% margin for Kirkpatrick of $981,548, which comes to $7,525,203. Please bear in mind that the Kirkpatrick

margin should be increased by an additional $154,347, which was the 3% included by NEI as described above). We then told him that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project 'over the top'.

"We then told Akindele that this meant that our quotation would have to be in the area of $9,400,000. He replied to us that the reason for his week's delay in coming to London was to have a chance to have a secret look at the other two quotations made by European concerns, and that there should be no problem for us to up our quotation so that the total CIF Nigeria price would come to approximately $10,750,000.

"Ross and I then went back to the hotel, and Ross re-calculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus, and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. Benson Akindele had called Nigeria on Monday morning to get the approximate costs of unloading all of the material in Lagos and trucking it to Kaduna.

"At this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.

"Ross and I then went to see Ringim at his flat in London, and left with him a copy of the quotation that we had typed up that afternoon, plus one of the big folders. Ringim assured us of his cooperation. Obviously, he wanted to discuss the commission breakdown since he was thinking in terms of receiving some 10% of the commission, and asked that Akindele meet him in Lagos at his hotel Sunday night, March 29th at 9 P.M. to talk it over."

In May 1981, two Panamanian corporations named, respectively, Dereks and Los were established whereby, pursuant to written agreements, Kirkpatrick agreed to pay to them a commission equal to twenty percent (20%) of the price agreed to be paid by Nigeria for the aero medical equipment. These corporations were set up and controlled by Akindele for the sole purpose of receiving these payments and making distributions of the sums thereby received.

In July 1981, Environmental Tectonics Corporation wrote to the Armed Forces Attache of the Embassy of Nigeria in Washington (Attention Air Commodore L. O. Uwayzor) whereby Environmental Tectonics Corporation sought the opportunity to fulfill the Nigerian contract needs.

In September 1981, the President of Environmental Tectonics Corporation, Mr. William F. Mitchell, attended the International Congress on Aviation Medicine at Nancy, France and, while there, discussed the Nigerian aero medical needs with various persons attending that conference from Nigeria

including, particularly, Dr. M.A. Owolabi who was then the Flight Surgeon for the Nigerian Air Force. At that same time, Mr. Mitchell came to learn that a certain Dr. Plumptre, Wing Commander for Medical Services at Ikeja, Nigeria had some connection with Kirkpatrick and desired to keep Environmental Tectonics Corporation from being involved in the bidding process.

In December 1981, Mr. Mitchell travelled to Lagos for the purpose of getting further details on the Nigerian aero medical needs and for the purpose of providing further information as to the capabilities of Environmental Tectonics Corporation. While there he met Dr. I.A. Odeh and was joined at that meeting by Dr. Plumptre. During the course of those meetings the Nigerian officials seemed to learn for the first time that Kirkpatrick was not a manufacturer of the aero medical equipment (but was merely a broker for such equipment) whereas Environmental Tectonics Corporation had been a manufacturer for almost twelve (12) years and a supplier of such equipment to the United States Air Force and to the United States Navy as well as to various foreign air forces.

Between December 1981 and February 1982, Environmental Tectonics Corporation prepared bids on each of the components of the aero-medical needs of the Nigerian Air Force for the purpose of submission to the appropriate Nigerian officials.

In February 1982, Mr. Mitchell returned to Lagos for the purpose of presenting Environmental Tectonics Corporation's bids.

In March 1982 (and continuing, apparently, into April 1982) Carpenter (on behalf of Kirkpatrick) had further meetings with Akindele and Ringim whereby the division of the twenty percent (20%) add-on was agreed upon and the price to the Republic of Nigeria for the aero medical equipment seems finally to have been set at about $11,000,000. $1,900,000 of the price increase was intended for the "mark-up" and $1,700,000 was intended as additional profit for Kirkpatrick.

The division of the twenty percent (20%) was agreed to be made as follows:

2 1/2% - for Akindele
5 % - for Air Force
2 1/2% - for medical group
5 % - for the party
2 1/2% - for the minister himself
2 1/2% - other key defense personnel

(We are not presently able to state whether or, if so, how much of the payments ultimately made to the Panamanian corporations were distributed to the individuals or to members of the groups here identified. We do know that $1,764,019.58 was paid to the Panamanian corporations by Kirkpatrick for the purposes here recited.)

On March 19, 1982, a contract was entered into between the Ministry of Defense and Kirkpatrick for supply of the aero medical equipment for the total purchase price of $10,800,000.

In September 1982, payments totalling $311,587.04 were made by Kirkpatrick to the Panamanian corporations.

In December 1982, payments totalling $589,073.00 were made by Kirkpatrick to the Panamanian corporations.

In February 1983, payments totalling $290,486.54 were made by Kirkpatrick to the Panamanian corporations.

In August 1983, payments totalling $580,973.00 were made by Kirkpatrick to the Panamanian corporations.

The amounts set forth in the preceding four paragraphs constitute, according to Kirkpatrick's admissions in the American courts, twenty percent (20%) of the funds received

from the Republic of Nigeria pursuant to the contract of March 19, 1982.

In April 1983, upon becoming aware that its price for the aero medical equipment was several million dollars less than Kirkpatrick's price to Nigeria for the same equipment, and otherwise coming to believe that improper payments of the sort mentioned above had been made, representatives of Environmental Tectonics Corporation reported the facts as then known to them to Wing Commander Olufemi Akinyosoye and to the United States Embassy in Lagos.

Beginning in March 1984, and continuing through the present time, we are informed that Kirkpatrick has failed to perform the contract although paid in excess of $8,820,000. In that connection, both Dr. Akinyosoye and Dr. M.A. Owolabi appear to be among the individuals who have tried to correct the Kirkpatrick shortcomings and otherwise to rectify the situation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 86-796-HJS

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	:	
	:	TRANSCRIPT OF
Plaintiffs,	:	PROCEEDINGS
-v-	:	August 20, 1986
W.S. KIRKPATRICK, INC., et al.,	:	
Defendants.	:	
	:	Newark, New Jersey

BEFORE:

HONORABLE ALFRED J. LECHNER, JR.
UNITED STATES DISTRICT COURET JUDGE

Appearances:

RUTTER, TURNER & STEIN
BY: THOMAS B. RUTTER, ESQ.
For the Plaintiff.

SPENGLER, CARLSON, GUBAR, BRODSKY & FRISCHLING
BY: THOMAS H. SEAR, ESQ.
and
RHONDA D. ORIN, ESQ.
For the Defendant Kirkpatrick & DIC Holding

LOWENSTEIN, SANDLER, BROCHIN, KOHL, FISHER, BOYLAN & MEANOR
BY: KELLY NEWTON, ESQ.
For Defendant Carpenter.

SILLS, BECK, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN & EPSTEIN
BY: ROBERT J. ALTER, ESQ.
For Defendant Chu

JOANNE M. HOUSTON, C.S.R.
Official Court Reporter - United States District Court
P.O. Box 397
Newark, N.J. 07101
(201) 352-2586
(201) 645-2260

August 20, 1986

THE COURT: We have a Court Reporter here. Could you each identify yourself for the record with regard to your respective clients?

Mr. Sear, you start. I can't hear you.

MR. RUTTER: Tom Rutter on behalf of the plaintiff.

MR SEAR: Thomas Sear and Rhonda Orin on behalf of the defendants, W. S. Kirkpatrick and Development Industrial Corporation DIC (Holding) Inc.

MR ALTER: Robert J. Alter. I am covering for a partner in the firm, Lawrence S. Horn, an observer unfortunately more than anything else, because I don't know that much about the case. I believe we represent the defendant Chu.

THE COURT: All right.

Anybody else on the line? I have Mr. Rutter, Mr. Sear and the associate from your office.

MR. SEAR: Rhonda Orin.

MS. NEWTON: Kelly Newton from Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan and Meanor on behalf of Harry Carpenter.

THE COURT: The reason I asked for this conference call is we have a motion for Monday. I'm only going to address the motion to dismiss, one 12(b)6 motion, not the Fifth Amendment motion that's on appeal from the Magistrate.

I have a number of questions and I don't need responses right now to any of these, but after I give you these questions perhaps without;t responding we could talk about the posture of the motion. All right.

Can you all hear me?

MR. SEAR: Yes.

MR RUTTER: Yes.

THE COURT: Now, with regard to the Act of State Doctrine, there are a number of allegations in the complaint with regard to the bidding practices between Nigerian Government and I guess it would be Kirkpatrick and by implication the other defendants. I think I understand the complaint to say that before the final bid went in, the formal bid, it was increased by 20 percent to cover the bribes.

Mr. Rutter, am I correct on that? Mr. Rutter, I can't hear you.

MR. RUTTER: You correctly understand.

THE COURT: Thank you. I can barely hear you. There is a bad connection.

The questions that I have, in light of this, are: is there any law in Nigeria concerning bribery and public officials with regard to public contracts?

Did Nigeria compell the payment of the bribe under penalty or loss of the contract?

Has Nigeria been informed and, if so, how, when and by whom of the bribery?

Has Nigeria sought legal redress against its governmental representatives or anybody else receiving the bribes and/or any defendants in this case?

In paragraph 35 of the amended complaint, you talk about several people who have received payments. They include: "The medical group", "The partys", "The minister himself" and other key defense personnel. Who are the medical group, the party and the minister?

I would appreciate a clean copy of the contract that is completely readable. I can't read the copy that I have which is attached to the complaint.

Has the contract been completed?

Have all obligations been performed under the contract?

Have the goods and supplies been delivered?

Has the base been constructed?

Are there any internationally accepted standards concerning bribery under situations with regard to this case?

Who initiated the concept of the bribe, the defendants or the Nigerians?

Has Nigeria done anything in light of the contract and the allegations in this case and, if so, what and when?

Has the Nigerian Government challenged in any way the contract or the parties to the contract?

One other point concerning the RICO aspect. In the amended complaint -- I believe it's paragraph 57, there is an allegation or "other improper acts" that, I believe, are

suggested to be similar to the Nigerian situation. As I recall, and I don't have the complaint in front of me, there are no facts: these are conclusory statements. Is this type of a pleading legally sufficient under the Rico setting?

Now, I ask these questions in connection with the motion that is pending in front of me. Since I've asked these questions, it seems to me I'll have to handle one question under a Rule 56, summary judgment treatment since I'll be asking for information other than that contained in the pleadings. I would appreciate receiving this information, if it's at all available, it will help me rule on the motion.

Now, if anybody has any comments on my request, I'll hear you in turn. Does anybody wish to be heard on this?

MR. RUTTER: This is Tom Rutter for the plaintiff.

I believe I understand your questions. I have no objection to answering them, to the extent that the information is available to us on the plaintiff's side.

THE COURT: I appreciate that. Thank you.

MR. RUTTER: I would also ask, however, that any answer that is given to you by the defendant be given to the plaintiff, since they have the knowledge and give it to us and the answer as to whether the contract has been performed and if there is any civil or criminal action by the Nigerians against anybody, to supply us.

THE COURT: Absolutely. What I suggest is as follows: you all submit this information to me together and then if you feel there is necessity to respond to an adversary's submission, I'll allow you to do so. I would like to receive this all one bulk submission, with the opportunity to respond. I appreciate the fact that some of the information may be difficult to obtain or it may take a little time.

I need the information to rule on the application that's in front of me. I was assigned this case in mid or late July. That's the status of where I am in the case.

MR. RUTTER: Perhaps it's how promptly we'll be able to make a joint submission on the fact.

THE COURT: Mr. Sear, any input on that?

MR. SEAR: Yes. In terms of the questions that we're going to be able to answer, my immediate reaction is that we'll be able to answer them very, very quickly. There are a number of questions, without getting into the merits of our motion to dismiss and so forth, but there are a number of questions as to which we have no knowledge and would be looking to the plaintiff for whatever information or evidence or facts they have.

THE COURT: Well, if I can suggest that perhaps you people pool your resources on this and see what you can develop. If we fall short on answering some of these questions, maybe we can explore a little bit further to see what we can do to answer them. Maybe by answering some, it won't be necessary to answer all. I don't know, I don't have enough information. That's why I pose this.

MR SEAR: Your Honor, you have a notion as to how this fits in with the scheduled oral argument on Monday at 11?

THE COURT: Well, my point is I don't think that we should go ahead with the oral argument, because I'm asking these questions. I am asking the questions so I will feel more comfortable in responding to the issues that were brought up. I am a bit ill at ease in applying the arguments to the limited facts that I have and by getting this information I will have more of a foundation to look at what is being presented. I will look at it on a summary judgment basis in light of the request by me.

MR RUTTER: On behalf of the plaintiff, we understand your concern. I'm going to --

THE COURT: We have a very bad connection with Mr. Rutter, everyone else is coming in clear.

You proposed to speak with Mr. Sear by telephone and then I assume get back to me?

MR. RUTTER: I would like to speak with Mr. Sear so he and I can come, and other counsel, of course, get some understanding as to a timetable when we can make the joint submission to you and advise you of that so that you can schedule the matter accordingly, if that's agreeable to you.

THE COURT: Anybody have a problem with that?

MR. SEAR: No, your Honor. As a matter of fact, we're very desirous of having the motions ruled on, but we're even more desirous of having everything before your Honor that you need to have before you to make the proper ruling. So what I would suggest is that Mr. Rutter and myself try to maybe get together by phone tomorrow, after we've had a chance to review these questions and then communicate with your chambers as soon as we have a notion of when the information could be provided by both of us.

THE COURT: That would be fine with me. I want you to understand that I want to give you the time that's necessary, but I don't want to drag it on indefinitely, so.

MR. SEAR: From our end, it won't drag on because we're very much interested in getting the quickest hearing on these motions. We're going to jump through hoops to get all the information we can get, get in a very expeditious way.

MR. RUTTER: Can I suggest that we speak by telephone at noon tomorrow on the timetable?

MR. SEAR: Sounds good to me.

MR. RUTTER: I'll place the call.

MR. SEAR: Okay. Judge, if I might, could I ask who's -- if I can figure our a way of ordering a transcript? We've tried to take pretty good notes. If I can get a transcript of the questions, make arrangements to get them, that also will facilitate.

THE COURT: The court report is Joanne Houston. She is acknowledging right now that you're making the request. I'll have it sent to your firm in New York.

MR. SEAR: That would be great. Maybe if Miss Houston has a phone number we can talk with her directly about this.

MR. RUTTER: I likewise request that the court reporter send me them by Federal Express at my expense, a copy of the transcript.

THE COURT: All right. We'll have that done.

MR. ALTER: I join. I'd like a transcript.

THE COURT: Okay. Miss Newton?

MS. NEWTON: We'll make it unanimous.

THE COURT: All right.

MR. SEAR: It's easy to be unanimous.

THE COURT: I hope we have this agreement throughout the remainder of the case.

Is there anything else?

MR. RUTTER: No.

MR. SEAR: I take it, though, Judge, for planning purposes, to be realistic about it I don't think we'll make a Monday argument.

THE COURT: I don't think you'll make it either.

MR. SEAR: Okay. Very good. We'll get cracking on this right away.

THE COURT: When you are able to marshall all of the responses that you can, if we have to have an argument on a date other than a normally scheduled motion date, I'll be happy to accommodate all of you along those lines.

MR. RUTTER: Thank you.

MR. SEAR: Thanks very much, Judge.

THE COURT: Okay. Thank you for your time.

(Matter concluded.)

LAW OFFICES

RUTTER, TURNER & STEIN
872 PUBLIC LEDGER BUILDING
INDEPENDENCE SQUARE
PHILADELPHIA, PENNSYLVANIA 19106

(215) 925-9200
Telecopier (215) 926-1669

August 26, 1986

Honorable Alfred J. Lechner
United States District Court
for the District of New Jersey
United States Courthouse
and Post Office Building
Newark, New Jersey 07102

Re: Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co., Inc., *et al.*
Civil Action No. 86-796 AJL

Dear Judge Lechner:

Pursuant to our telephone conference call of August 20, 1986, Plaintiff's responses to your questions are as follows:

1. Is there any law in Nigeria as to bribery of public officials with respect to public contracts?

ANSWER: YES. Submitted herewith, marked Exhibit "A", are copies of the applicable Nigerian statutes as disclosed by our research.

2. Did Nigeria compel the payment of the bribe as a condition of contracting?

ANSWER: No.

3. Has Nigeria been informed of the bribe? How, when, by whom?

ANSWER: Yes. Nigeria was informed not later than the end of November 1985 as a result of publicity surrounding the admissions of guilt and sentences with respect thereto on behalf of Kirkpatrick and Carpenter in the United States District Court for the District of New Jersey. See paragraph 2 in the affidavit of Defendant Carpenter included in the Memorandum of Defendant Harry G. Carpenter In Opposition to Plaintiff's Appeal of Mr. Carpenter's Assertion of the Fifth Amendment Privilege Against Self-Incrimination.

In addition, counsel for Plaintiff in the instant matter has approached the Embassy of the Republic of Nigeria. As a part of that approach, a disclosure as to that matter has been made. Enclosed herewith as Exhibit "B" is a letter of July 31, 1986 to H.E. Ambassador Ignatius C. Olisemeka.

4. Has Nigeria sought redress against any official or any other person?

ANSWER: No.

5. With respect to Paragraph 35 of the Complaint, who are "the medical group", the minister, *etc.*?

ANSWER: Presently unknown to Plaintiff.

6. Has the contract been completed, *i.e.*, has it been performed by the supplying of the equipment and the building of the facility?

ANSWER: No.

7. Are there any international standards as to bribery or the payment of bribes in circumstances like this?

ANSWER: Yes, as reflected in the American Foreign Corrupt Practices Act, violation of which has been admitted to by Defendants Kirkpatrick and Carpenter.

8. Who initiated the concept of the bribe, *i.e.*, the Defendants or Nigerians?

ANSWER: Although Plaintiff has no direct knowledge at present on this question, Plaintiff is informed, and therefore believes, that the concept of the bribe was initiated by Defendant Carpenter and/or others on behalf of the corporate Defendants.

9. Has Nigeria done anything in light of these allegations, *i.e.*, have they challenged the contract or any of the parties thereto?

ANSWER: Not yet.

10. In paragraph 57, we make an allegation as to "other improper acts". Is this conclusionary statement, unsupported by any facts, sufficient for pleading purposes in the RICO setting?

ANSWER: The Court's reference to "other improper acts" refers, we assume, to the following language in paragraph 57: "...had previously engaged in one or more racketeering activities...". This language, whether measured by the standards of Rule 9 as pertains to fraud or by the standards of Rule 8 as pertains to the general Rules of federal pleading, is in our opinion sufficient. See, for example, the cases collected at 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1215 (1969); *Seville Industrial Machinery v. Southmost Machinery*, 742 F.2d 786 (3d Cir. 1984); and, *Kredietbank, N.W. v. Joyce Morris, Inc., et al.*, Civil Action No. 84-1903, Slip Opinion (D.C.N.J. January 9, 1986).

Respectfully submitted,

RUTTER, TURNER & STEIN

By _____
Thomas B. Rutter

TBR: rmd

cc: Thomas H. Sear, Esquire

A-146

Decree No. 38

[22nd November 1975]

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows:

PART I

Offences Involving Corruption

Punishment of corruption.

1. Any person who by himself or by or in conjunction with any other person—

(a) corruptly solicits or receives or agrees to receive for himself or for any other person; or

(b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,

any gratification as an inducement or reward for, or otherwise on account of—

(i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or

(ii) any member, officer or servant of the government or any public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such government or public body is concerned;

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Punishment of corrupt transaction with agents.

2. If—

(a) any agent corruptly accepts or obtains or agrees to accept or attempts to obtain, from any person for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Decree done or forborne to do, any act in relation to the affairs or business of his principal, or for showing favour or disfavour to any person in relation to the affairs or business of his principal; zor

(b) any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Decree done or forborne to do any act in relation to the affairs or business of the principal or for showing or forbearing to show favour or disfavour to any person in relation to the affairs or business of the principal;

he shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Increase of maximum penalty in certain cases.

3. A person convicted of any offence under section 1 or 2 of this Decree shall, where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with the Government or any department thereof or with any public body or a sub-contract to execute any work comprised in such a contract, be liable to imprisonment for a term of fourteen years or to a fine of ten thousand naira or to both such imprisonment and fine.

Presumption of corruption in certain cases.

4. Where in any proceedings against a person for an offence under section 1 or 2 of this Decree, it is proved that any gratification has been paid or given to or received by a person in the employment of the Government or any department thereof or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the Government or any department thereof or any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned unless the contrary is proved.

Acceptor of gratification to be guilty notwithstanding that purpose not carried out, etc.

5.—(1) Where in any proceedings against any agent for any offence under paragraph (a) of section 2 of this Decree, it is proved that he corruptly accepted, obtained or agreed to accept or attempted to obtain any gratification, having reason to believe or suspect that such gratification was offered as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person in relation to the affairs or business of his principal, he shall be guilty of an offence under that section notwithstanding that he did not have the power, right or opportunity so to do, show or forbear or that he did not in fact so do, show or forbear or that such act, favour or disfavour was not in relation to the affairs or business of the principal.

(2) Where in any proceedings against any person for any offence under paragraph (b) of section 2 of this Decree, it is proved that he corruptly gave, agreed to give or offered any gratification to any agent as an inducement or reward for doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person having reason to believe or suspect that such agent had the power, right or opportunity so to do, show or forbear and that such act, favour or disfavour was in relation to the affairs or business of the principal, he shall be guilty of an offence under that section

notwithstanding that such agent had no power, right or opportunity or that such act, favour or disfavour was not in relation to the affairs or business of the principal.

Corruptly procuring withdrawal of tenders.

6. A person—

(a) who, with intent to obtain from the Government or any public body a contract for performing any work, providing any service, doing anything, or supplying any article, material or substance, offers any gratification to any person who has made a tender for such contract, as an inducement or a reward for his withdrawing such tender; or

(b) who solicits or accepts any gratification as an inducement or a reward for his withdrawing a tender made by him for such a contract,

shall be guilty of an offence under this Decree and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Bribery of member of the Supreme Military Council, the National Council of States or the Executive Council, etc.

7. Any person—

(a) who offers any gratification to a member of the Supreme Military Council, the National Council of States or the Federal Executive Council or a member of the Executive Council of a State as an inducement or reward for such member to do or forbear to do any act in his capacity as such member; or

(b) who, being a member of any of the Councils mentioned in paragraph (c) of this section, solicits or accepts any gratification as an inducement or reward for

his doing or forbearing to do any act in his capacity as such member,

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for ten years or to a fine of ten thousand naira or to both such imprisonment and fine.

Bribery of member of public body.

8. Any person—

(a) who offers any gratification to a member of a public body as an inducement or reward for—

(i) such member to vote or abstain from voting at any meeting of such public body in favour or against any measure, resolution or question submitted to such public body; or

(ii) such member to perform or abstain from performing, or aid in procuring, expediting, delaying, hindering or preventing the performance of any official act; or

(iii) such member to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(b) who, being a member of a public body, solicits or accepts any gratification as an inducement or a reward for any such act, or any such abstaining, as is referred to in sub-paragraphs (i), (ii) and (iii) of paragraph (a) of this section,

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of ten thousand naira or to both such imprisonment and fine.

Penalty to be imposed in addition to other punishment.

9. Where a tribunal convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Decree, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the tribunal shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the tribunal, the value of that gratification and any such penalty shall be recoverable as a fine.

Principal may recover amount of secret gift.

10.—(1) Where any gratification has, in contravention of this Decree, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or aquittal of the defendant in respect of an offence under this Decree shall operate as a bar to proceedings for the recovery of such amount or money value.

(2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property.

PART II

Establishment, Powers, etc. of Corrupt Practices Investigation Bureau

Establishment of Bureau.

11.—(1) There is hereby established as a department of the Government of the Federation a Bureau to be known as the Corrupt Practices Investigation Bureau.

(2) The Bureau shall consist of a Director and such number of Assistant Directors and other officers subordinate to the Director and Assistant Directors as the Supreme Military Council may from time to time determine.

(3) The Director and the Assistant Directors shall be appointed by the Supreme Military Council and the other officers of the Bureau shall be appointed by the Public Service Commission of the Federation of the recommendation of the Director.

(4) The officers of the Bureau other than the Director and the Assistant Directors shall be known by such title as the Director may determine and the Director shall issue to every such officer a certificate under his hand which shall be evidence of that officer's appointment under this Decree.

General powers of investigation.

12. Notwithstanding anything to the contrary in any law, the Director and any officer of the Bureau authorised in that behalf by the Director either generally or with respect to any category of matters, if satisfied that there are reasonable grounds for suspecting that an offence under this Decree has been committed by any person, may make an investigation in the matter in such manner or mode as the Director may deem fit.

Director, etc., to have powers of a police officer. Cap 43. Cap 30. Laws of Northern Nigeria 1963.

13. The Director, Assistant Directors and the officers of the Bureau designated by the Director shall by virtue of this section have all the powers of a police officer and, without prejudice to the generality of the foregoing, may exercise in relation to offences under this Decree the same powers as are exercisable by a police officer under the Criminal Procedure Code in respect of offences under the Criminal Code, or as the case may be, the Penal Code.

Director's powers to obtain information. Cap. 42. Cap. 89.

14.—(1) In the course of any investigation or proceedings into or relating to an offence under this Decree by any person in the service of the Government or of any department thereof or of any public body under this Decree the Director may, notwithstanding anything to the contrary in any other law, by written notice—

(a) require any such person to furnish a sworn statement in writing enumerating all moveable or immoveable property belonging to or possessed by such person and by the spouse and children of such person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;

(b) require any such person to furnish a sworn statement in writing of any money or other property sent out of Nigeria by him or paid or delivered to him or to his account outside Nigeria during such period as may be specified in the notice;

(c) require any other person to furnish a sworn statement in writing enumerating all moveable or immoveable property belonging to or possessed by such person where the Director has reasonable grounds to believe that such information can assist the investigation;

(d) require the person in charge of any department office or establishment of the Government, or the chairman, chief executive, manager or similar officer of any public body to produce or furnish, as specified in the notice, any document or a certified copy of any document which is in his possession or under his control;

(e) require the manager of any bank to give copies of the accounts of such person or of the spouse or child of such person at the bank.

(2) Every person to whom a notice is sent by the Director under subsection (1) of this section shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of that notice within such time as may be specified therein and any person who wilfully neglects or fails so to comply shall be guilty of an offence under this Decree and shall be liable on conviction or imprisonment for one year or to a fine of one thousand naira or to both.

Powers of search and seizure.

15.—(1) Whenever it appears to the Director upon information and after such enquiry as he thinks necessary that there is reasonable cause to believe that in any place there is any document containing any evidence of the commission of an offence under this Decree or any article or property relating to the commission of an offence under this Decree the Director may, by warrant directed to any officer of the Bureau, empower the officer named herein to enter such place by force if necessary and search for, seize and detain any such document, article or property.

(2) Whenever it appears to any officer of the Bureau other than the Director, that there is reasonable cause to believe that in any place there is concealed or deposited any document containing evidence of the commission of an offence under this Decree and that officer as aforesaid has reasonable grounds for believing that by reason of the delay in obtaining a warrant the object of the search is likely to be frustrated, that officer may exercise in and in respect of such place all the powers mentioned in subsection (1) of this section in as full and ample a manner as if he were empowered to do so by warrant issued under the said subsection.

Director's power to order inspection of bankers' books.

16.—(1) The Director may, if he considers that any evidence of the commission of an offence under this Decree by any person in the service of the Government or of any

department thereof or of a public body is likely to be found in any banker's book relating to such person, his wife or child or to a person reasonably believed by the Director to be a trustee or agent for such person, by order under his hand authorise any officer of the Bureau named in the order to inspect any such book and the person so authorised may, at all reasonable times, enter the bank specified in such order and inspect such books kept therein and may take copies of any relevant entry in any such book.

(2) For the purpose of this section —

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"bank" has the same meaning as in section 41 of the Banking Decree 1969 and, for the avoidance of doubt, includes any bank exempted from the provisions of that Decree;

"banker's book" includes ledgers, day books, cash books, account books and all other books and documents used in the ordinary course of the business of a bank.

Obstruction of search, etc.

17. Any person who—

(a) refuses the Director or any person duly authorised for that purpose by the Director access to any place; or

(b) assaults, obstructs, hinders or delays him in effecting any entrance which he is entitled to effect under this Decree, or in the execution of any duty imposed or power conferred by this Decree; or

(c) fails to comply with any lawful demands of the Director or of any officer of the Bureau authorised by the Director to make such demands to the execution of his duty under this Decree; or

(d) refuses or neglects to give any information which may reasonably be required of him and which he has it in his power to give,

shall be guilty of an offence under this Decree and shall be liable on conviction to a fine of one thousand naira or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Director to submit report on offences to the DPP.

18. On the completion of an investigation in respect of any offence under this Decree the Director shall cause to be delivered to the Director of Public Prosecutions a report of his findings in the matter and shall when required to do so by the Director of Public Prosecutions furnish to the Director of Public Prosecutions all evidence in his custody or under his control that may be required by the Director of Public Prosecutions for the institution of proceedings before a tribunal under this Decree.

PART III

Establishment, etc. of Tribunals and Trial of Offences

Constitution of special tribunals, etc.

19.—(1) The Head of the Federal Military Government shall, whenever occasion demands, constitute one or more tribunals for the trial of offences under this Decree.

(2) A tribunal constituted under subsection (1) of this section shall consist of a chairman who shall be a judge of the High Court of a State or of the Federal Revenue Court and two other persons at least one of whom shall be an officer in the Nigerian Army not below the rank of major or an officer of the Nigerian Navy or Air Force of equivalent rank.

Procedure for the trial of offences.

20.—(1) The trial of offences under this Decree shall commence by way of application, supported by evidence on affidavit, made to the tribunal in that behalf by the Director of Public Prosecutions or by such officers subordinate to him as the Director of Public Prosecutions may authorise to do so;

Provided that the question whether any authority has been given in pursuance of this subsection or what the authority was, shall not be enquired into by any person except at the instance of the Director of Public Prosecutions.

(2) Whereafter perusal of the application and the evidence or affidavit or any further evidence in such form as the tribunal may consider necessary the tribunal is satisfied that any person appears to have committed any offence under this Decree, [?] shall cause notice to be served on that person calling upon him to show cause why he should not be punished for that [????]

(3) Where no cause or no sufficient cause under subsection (2) above is shown by the person on whom a notice is served under that subsection to its satisfaction, the tribunal may, after such inquiry as the tribunal may consider necessary, convict that person of the offence and impose upon him an appropriate sentence in accordance with the provisions of this Decree.

(4) The procedure to be followed upon an application to the tribunal under subsection (1) above shall be in accordance with such rulings as the tribunal may make either generally or for the purpose of a particular trial; and in relation to and for the purpose of proceedings of the tribunal the tribunal shall have the same powers, whether of compelling the attendance of persons and the production of documents or otherwise, as the High Court of a State has in the exercise of its ordinary jurisdiction.

(5) An offender under this Decree shall be entitled to defend himself in person or by a person of his own choice

who is a legal practitioner, and to examine in person or by his legal practitioner, if he so wishes, any person whose evidence on affidavit or otherwise forms part of the case against him.

Evidence of pecuniary resources or property.

21.—(1) In any trial for an offence under this Decree the fact that an accused person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the time of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the tribunal as corroborating the testimony of any witness in such trial or inquiry that such accused person accepted or obtained any gratification and as showing that such gratification was accepted or obtained corruptly as an inducement or reward.

(2) An offender shall, for the purposes of subsection (1) of this section be deemed to be in possession of resources of property or to have obtained an accretion thereto where such resources or property are held or such accretion is obtained by any other person whom, having regard to his relationship to the accused person or to any other circumstances, there is reason to believe to be holding such resources or property or to have obtained such accretion in trust for or on behalf of such accused person or as a gift from such accused person.

Evidence of accomplice.

22. Notwithstanding anything to the contrary in any law (including any rule of law), no witness shall, in any such trial or inquiry as is referred to in section 20 of this Decree, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

Witness to be compellable in certain cases.

23.—(1) Whenever two or more persons are charged with an offence under this Decree the tribunal may require one or more of them to give evidence as a witness for the prosecution.

(2) Any person who refuses to be sworn or to answer any lawful question after having been required to do so pursuant to subsection (1) above may be dealt with in the same manner as a witness so refusing may be dealt with by a High Court.

(3) Any person required to give evidence under this section and who in the opinion of the tribunal makes true and full, disclosure of all things as to which he is lawfully examined shall be entitled to receive a certificate of indemnity under the hand of the chairman of the tribunal, stating that he has made a true and full disclosure of all things as to which he was examined, and such certificate shall be a bar to all legal proceedings against him in respect of all such things aforesaid.

Protection of informers.

24.—(1) Except as hereinafter provided, no complaints as to an offence under this Decree shall be admitted in evidence or liable to inspection in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer or state any matter which might lead to his discovery.

(2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named, described or which might lead to his discovery the tribunal, before which the proceeding is held, shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.

(3) If on a trial for any offence under this Decree the tribunal, after full inquiry into the case, is of opinion that the informer wilfully made in his complaints a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the tribunal is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the tribunal may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

Provided, however, that where the Director of Public Prosecutions certifies in writing that it is not in the public interest to make such a disclosure the tribunal shall not, notwithstanding any rule of law to the contrary, permit any such inquiry or disclosure of the informer.

PART IV

Supplementary

Parties to offences.

25. Any person who—

(a) aids, counsels, abets or procures any person to commit an offence under this Decree, or

(b) conspires with any person to commit such an offence, whether or not he is present when the offence is committed or attempted to be committed,

shall be deemed to be guilty of the offence as a principal offender and shall be liable to be proceeded against and punished accordingly under this Decree.

Liability of citizens of Nigeria for offences committed outside Nigeria.

26. The provisions of this Decree shall, in relation to citizens of Nigeria, have effect outside as well as within Nigeria, and where an offence under this Decree is committed by a citizen of Nigeria in any place outside Nigeria he may be dealt with in respect of such offence as if it had been committed within Nigeria.

Provided that any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the offence, if such offence had been committed in Nigeria, shall be a bar to further proceedings against him, under any written law for the time being in force relating to the extradition of persons, in respect of the same offence outside Nigeria.

No convictions where gratification is proved customary.

27.—(1) Subject to subsection (2) of this section, no person charged with any offence under this Decree being an offence involving the receipt of gratification shall be convicted of that offence if he proves that the receipt of the gratification is customary in his profession, trade, vocation or calling and the tribunal is satisfied that the amount of the gratification was reasonable in the circumstances of the case.

(2) Subsection (1) of this section shall not apply in respect of any offence by a person in the employment of the Government or any department thereof or of any public body.

Right to appeal to the Supreme Court.

28. Any person convicted of an offence under this Decree may within 30 days of the date of his conviction appeal as of right to the Supreme Court and the provisions of any enactment (including rules of court) regulating the practice and procedure of the Supreme Court shall, with any necessary modifications, apply in respect of such an appeal as they apply

in respect of appeals from the decisions of any court subordinate to the Supreme Court.

Supplementary provisions.

29.—(1) It is hereby declared that a tribunal shall, notwithstanding anything to the contrary in any law (including the Constitution of the Federation or of a State) have the power in appropriate cases to award the punishments and impose the penalties specified in this Decree.

(2) No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any matter or thing done or proposed or purported to be done under this Decree by the Head of the Federal Military Government or by any person acting in accordance with the authority of the Head of the Federal Military Government or by the Director or any other officer of the Bureau or by any member or other officer of a tribunal constituted under this Decree.

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(3) The question whether any provision of Chapter III of the Constitution of the Federation has been, is being or would be contravened by anything done or proposed or purported to be done in pursuance of this Decree shall not be inquired into by any court of law.

Interpretation

30. In this Decree, unless the context otherwise requires—

"agent" means any person employed by or acting for another and includes a trustee, administrator and executor, and a person serving the Government or under any corporation or public body, and for the purposes of section 4 of this Decree, includes a sub-contractor and any person employed by or acting for such sub-contractor;

"Director" means the Director of the Corrupt Practices Investigation Bureau appointed under section 11 of this Decree;

"the Government" means the government of the Federation or of a State;

"gratification" includes—

(a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether moveable or immoveable;

(b) any office, employment or contract;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;

(ATTACHMENT TO AUGUST 26, 1986 LETTER FROM T. RUTTER TO HON. ALFRED LECHNER)

July 31, 1986 letter from T. Rutter to the Embassy of Nigeria is reproduced at A-124-126.

SPENGLER CARLSON GUBAR BRODSKY &
FRISCHLING
Attorneys for Defendants W.S. Kirkpatrick
& Co., Inc. and D.I.C. (Holding) Inc.
280 Park Avenue
New York, New York 10017
(212) 286-4000

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,	:	
Plaintiff,	:	IN THE UNITED STATES
- against -	:	DISTRICT COURT FOR THE
W.S. KIRKPATRICK & CO., INC., DIC (HOLDING) INC., INTERNATIONAL DEVELOPMENT CORPORATION, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, W.S. KIRKPATRICK & CO., INTERNATIONAL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON, and R.H. EDWARDS	:	DISTRICT OF NEW JERSEY
	:	Civil Action No. 86-796 AJL
Defendants.	:	

SUBMISSION OF W.S. KIRKPATRICK & CO., INC. AND D.I.C. (HOLDING) INC. IN RESPONSE TO QUESTIONS POSED BY THE COURT ON AUGUST 20, 1986

Of Counsel:
Thomas H. Sear
Rhonda D. Orin
SPENGLER CARLSON GUBAR BRODSKY
& FRISCHLING

Lawrence S. Horn
SILLS BECK CUMMIS ZUCKERMAN
RADIN TISCHMAN & EPSTEIN

SUBMISSION OF W.S. KIRKPATRICK & CO., INC. AND D.I.C. (HOLDING) INC. IN RESPONSE TO QUESTIONS POSED BY THE COURT ON AUGUST 20, 1986

This submission is in response to questions posed by the Court in a telephone conference on August 20, 1986. Each question is answered individually herein. Taken together, the responses to these questions, the Amended Complaint, the Motions to Dismiss and all accompanying and opposing memoranda make clear that summary judgment should be granted against plaintiff in this action, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In reviewing these responses, this Court should recognize that it may have misunderstood certain facts set forth in the pleadings and papers. Specifically, the questions refer to the payments at issue as "bribes," which suggests that this Court might have concluded that the bribery alleged in this action is an established fact. We believe, however, that it is presently unknown whether these payments were ever made, or even offered, to any officials and/or other representatives of the Government of Nigeria. Therefore, these payments cannot be accurately described as bribes, and proof that these payments were bribes remains to be offered by the plaintiff herein.

All that is known thus far is that Benson "Tunde" Akindele, a Nigerian national who served as the local agent for W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick") on the aeromedical contract at issue, told Kirkpatrick to pay a 20% commission to two companies under his control, and that he would then distribute this commission among various Nigerian government officials and entities. Kirkpatrick followed Mr. Akindele's instructions and paid the commission to the companies. However, Kirkpatrick has no knowledge of whether Mr. Akindele thereafter distributed the commission in the manner he had described.

It is well recognized that payments intended as bribes frequently do not reach their intended governmental recipients.

Foreign and Corporate Bribes: Hearings on S.3133 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 39 (1976) (testimony of George Ball, former Under Secretary of State); Letter from Elliot Richardson, Chairman of the President's Task Force on Questionable Foreign Payments Abroad, to Sen. William Proxmire, June 11, 1976, at 3. For example, in a celebrated case, Adnan Khashoggi, a well-known sales agent in the Middle East, retained $450,000 that have been given to him by Northrop Corp. to pass on to two air force generals in Saudi Arabia. *Time*, Feb. 23, 1976, at 33, col. 1.

Kirkpatrick pled guilty in the criminal proceeding despite the lack of knowledge regarding the actual distribution of the commission because the lack of such knowledge was not a defense to Kirkpatrick for alleged violations of the Foreign Corrupt Practices Act (the "Act"). Under the Act, a violation is established if a business entity provides monies to an intermediary and has a "reason to know" that such monies will be offered or paid to foreign government officials in connection with obtaining business. Foreign Corrupt Practices Act, 15 U.S.C. § 78-dd-2(a) (3). Thus, the government's position was that the payment by Kirkpatrick to the two companies, with knowledge of Mr. Akindele's stated intent, constituted a violation. The Justice Department could not prove and did not possess any evidence, to our knowledge, that any money actually went to a Nigerian government official or that the offer of any money actually influenced or caused the awarding of the contract.

For all of these reasons, Kirkpatrick pled guilty on November 18, 1985 to one count of violating the Act. Kirkpatrick's conviction, however, in no way establishes these payments as bribes.

RESPONSES TO QUESTIONS

Question 1:

Is there any law in Nigeria concerning bribery and public officials with regard to public contracts?

Response to Question 1:

The relevant laws of Nigeria are attached as Exhibit A. Even a brief review of these laws, in the absence of expertise in the Nigerian legal system, makes clear that bribery is a serious offense in Nigeria and corruption of public officials a grave national concern. Specifically, in Nigeria, it is prohibited for a public servant to (i) accept or (ii) obtain or (iii) agree to accept or (iv) attempt to obtain any gratification, other than lawful remuneration, as a motive or reward for official actions. Severe punishment, including both imprisonment and fines, may be imposed for such conduct.

In light of the above, the Court should appreciate, and afford due consideration to, the fact that this action cannot be resolved without determining whether Nigerian officials violated Nigeria's laws. Such a determination is necessary since a critical element of proof under the Robinson-Patman Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the New Jersey Anti-Racketeering Act is that the Government of Nigeria and/or its officials and other representatives agreed to accept, and accepted, bribes in return for awarding the aeromedical contract to Kirkpatrick. Unless Environmental Tectonics Corporation, International ("ETC") proves these facts, ETC will fail to establish that Kirkpatrick improperly influenced the decision to award the contract to Kirkpatrick.

Further, assuming that proof of payments to Nigerian officials is presented by plaintiff, Kirkpatrick, in its defense, would also necessarily seek additional evidence that establishes that Nigerian officials and/or representatives violated Nigerian laws, not only in this instance, but in other cases and as a

matter of course. Specifically, Kirkpatrick would attempt to show that Nigerian officials and/or other representatives required the payment of bribes in most, if not all, construction projects like the one involved in this case. First, Kirkpatrick would claim that it made the payments at issue only because Mr. Akindele first advised Kirkpatrick that the Nigerian government would not award the contract to any company that did not make such payments. Second, Kirkpatrick would argue that no company, including ETC, would have been awarded the contract without making such payments because the normal practice was to demand them. Third, Kirkpatrick would contend that, in objecting to being deprived of the contract, ETC is in effect objecting to being deprived of its "right" to make these payments itself.

The importance which the Government of Nigeria places upon the crime of bribery is evident by the reaction of that government to the Justice Department investigation of Kirkpatrick. According to Steven M. Levy, the Justice Department attorney who conducted the investigation, the Nigerian government is extremely interested in receiving further information about the case, including the names of any persons who were involved on behalf of the Nigerian government. Mr. Levy indicated at the sentencing hearing of Kirkpatrick on January 6, 1986 that the Nigerian government has made numerous attempts to obtain such information from the Justice Department. The relevant pages of the transcript of this hearing are attached as Exhibit D, with the entire transcript attached as Exhibit E.

Of immediate relevance to the Act of State issue is Mr. Levy's disclosure at the sentencing hearing that the State Department was involved with, and "very concerned" about the consequences of disclosure of, the facts of the incident and the investigation from a foreign relations' perspective. Specifically, Mr. Levy stated:

> . . . I can say that the government of Nigeria as well as the State Department have shown a vital interest in this case. In fact, the State Department has been very

> concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain evidence about who possibly received the payments which are set forth in the memoranda that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State Department has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.

See Exhibit D.

The Act of State doctrine is designed specifically to prevent judicial intrusion into a situation of this nature which is constitutionally entrusted to the State Department and the Executive Branch. Indeed, given the basis for the doctrine, it would not matter if the present government of Nigeria consented to the litigation of this action, since the State Department might very well conclude, regardless of such consent, that the overall political and international effect would be negative. Here, it is clear that the State Department is concerned about the effects of disclosure of certain information upon relations between the United States and the Government of Nigeria. Since the State Department's concerns are manifest, this Court should not entertain this action, which would constitute judicial intervention in an area of executive concern.

Question 2:

Did Nigeria compel the payment of the bribe under penalty of loss of the contract?

Response to Question 2:

Kirkpatrick's knowledge on this subject is derived from two memoranda, which are attached hereto as Exhibits B and C. These memoranda establish that Mr. Akindele advised Kirkpatrick that the Nigerian government, as a matter of course, required payments as bribes to be made by any company that is awarded a Nigerian government contract. Specifically, the March 30, 1981 memorandum, which is attached as Exhibit B, states that Mr. Akindele's attorney advised Kirkpatrick that such payments are "required and asked for by the customers." Further, the memoranda make clear that Mr. Akindele advised Kirkpatrick that it would not have been awarded the contract unless it paid money to Nigerian officials and/or representatives. For example, according to the March 30, 1981 memorandum, Mr. Akindele, in advising Kirkpatrick to pay a bribe, "reviewed in great detail *the habit of Nigeria and the expectations of many*, and stated that we *must* think in terms of a 20% margin . . . to put the project 'over the top' (emphasis supplied)."

Question 3

Has Nigeria been informed and, if so, how, when and by whom of the bribery?

Response to Question 3

While Kirkpatrick has not communicated directly with the Government of Nigeria on this subject, Kirkpatrick believes that the Nigerian Government has been so informed. The basis for this belief is as follows. First, Mr. Levy's statements during Kirkpatrick's sentencing hearing indicate that the Government of Nigeria has some knowledge of this issue. Second, defendant Harry G. Carpenter, Jr., the company's former Chairman of the Board and Chief Executive Officer, stated in support of his assertion of Fifth Amendment privilege that he has been advised by Mr. Akindele that this issue had been reported in Nigerian newspapers. Third, Thomas B. Rutter, counsel for ETC, advised Thomas H. Sear, counsel for

Kirkpatrick, that Rutter's firm recently contacted Nigerian officials, notified them of this action and of the alleged bribery, and requested a statement indicating that they did not object to this action.

Kirkpatrick is not aware of the results of Rutter's contact with the Nigerian government, that is, whether the Nigerian government is prepared to state that it has no objection to the pursuit of this action. However, as noted earlier, the Nigerian government's position on this matter is irrelevant under the Act of State doctrine. This doctrine is designed to preserve the principle of separation of powers between the judiciary and the executive. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). Since relations with foreign countries fall under the purview of the executive, the judiciary is barred from intervening in this arena. *See id.* The opinion of a foreign government regarding the effect of judicial intervention does not alter the fact that relations with that country are an executive, and not a judicial, concern and that the executive branch might not desire judicial intervention for a number of valid reasons.

Further, the judiciary cannot appreciate all of the reasons why a foreign country may issue such a statement, and therefore cannot – and indeed should not – evaluate the effect on foreign relations of pursuing a particular case. For example, a government that is in power at the time of the incident that gave rise to the action may be out of power at the time the action is filed. That government may be friendly to the United States while the government that succeeds it is unfriendly. The successor, unfriendly government may benefit politically from having the action regarding the prior, friendly government be pursued in our courts. Yet the effect of such pursuit may be disastrous from the perspective of the United States. That the judiciary is not in a position to evaluate such considerations, and cannot do so without violating the principle of separation of powers, is the premise of the Act of State doctrine. *See generally id.* It is for all of these reasons that the opinion of the Nigerian government regarding the pursuit of this action is of no consequence here.

Under the circumstances, we believe that the contact of counsel for ETC with the Nigerian government is not appropriate and offends the spirit, if not the letter, of the Act of State doctrine. It is for the executive branch of our government to communicate with the Nigerian government regarding such sensitive matters as bribery of Nigerian governmental officials. Such a step is not one to be taken by an individual in pursuit of a private action in federal court, unbeknownst to the State Department.

Indeed, we submit that the action of ETC's counsel is particularly inappropriate since this Court has not yet decided whether this action is barred by the Act of State doctrine. Unless and until this Court decides, all parties to this action should refrain from engaging in any conduct which involves the government of Nigeria in this regard.

Question 4

Has Nigeria sought legal redress against its governmental representatives or anybody else receiving the bribes and/or any defendants in this case?

Response to Question 4

The Government of Nigeria has not sought legal redress against Kirkpatrick or D.I.C. (Holding) Inc. ("D.I.C. Holding"). Kirkpatrick and D.I.C. Holding have no knowledge regarding whether legal redress has been sought against any of its governmental representatives or anyone else, except that Mr. Carpenter has indicated that he has been advised that legal redress has been threatened against him.

Question 5

Who are the medical group, the party and the minister (as set forth in paragraph 35 of the Amended Complaint)?

Response to Question 5

The knowledge of the defendants who prepared this submission regarding these names is derived from the memorandum dated March 8, 1982, which is attached as Exhibit C. Regarding those names, the memorandum states:

> During that September visit, Akindele gave me a breakdown of what the overall 20% commission would constitute. It came down to the following:
>
> 2 1/2 – for Akindele
> 5 – for air force
> 2 1/2 – medical group
> 5 – party
> 2 1/2 – minister himself
> 2 1/2 – other key defense personnel

Litigation and resolution of this action, of course, would require inquiry into the identities and actions of the above-listed individuals and entities. Under the circumstances, since it is the plaintiff who sets forth allegations regarding these individuals and entities in the Amended Complaint, the plaintiff is the party best suited to provide the information the Court seeks.

Question 6

Has the contract been completed? Have all obligations been performed under the contract? Have the goods and supplies been delivered? Has the base been constructed?

Response to Question 6

Kirkpatrick has completed 95% of its obligations pursuant to the contract.* It had not completed the remaining 5% of its

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* Kirkpatrick expects to submit to the Court next week a clean, readable copy of the contract, as per the Court's request. The copy will be made from the original contract, which is currently in the possession of Justice

(Footnote continued)

obligations by the time the criminal investigation commenced. Kirkpatrick did not perform any services on the contract following the commencement of the criminal investigation and has no intention of doing so at any time. Kirkpatrick believes that Nautilus Enviromedical Systems, Inc., one of the subcontractors on the original contact, has arranged with the Government of Nigeria to complete the contract and is currently in the process of doing so.

Question 7

Has Nigeria done anything in light of the contract and the allegations in this case and, if so, what and when? Has the Nigerian Government challenged in any way the contract or the parties to the contract?

Response to Question 7

This question is best answered by reference to the Response to Question 1, *supra* at 3, and the Response to Question 4, *supra* at 11.

Question 8

Are there any internationally accepted standards concerning bribery under situations with regard to this case?

Department investigators. These investigators have retained possession of all documents produced to the government by Kirkpatrick in the course of the grand jury investigation which led to Kirkpatrick's guilty plea.

Kirkpatrick made every effort to obtain a copy of the contract in time to submit it to the Court today. The company was unsuccessful because of the time necessary for the government to consider Kirkpatrick's request. However, Mr. Levy has assured Kirkpatrick that he will send to Kirkpatrick by next week the clearest and most readable copy of the contract that the investigators were able to make. Kirkpatrick will immediately forward this copy to the Court.

Response to Question 8

Bribery of government officials is expressly prohibited in virtually all countries in the world. See, e.g., Foreign and Corporate Bribes: Hearings on S.3133 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 84-85 (1976) (testimony of Leonard Meeker, Center for Law and Social Policy; *id.* at 103 (testimony of Elliot Richardson, Secretary of Commerce); Ad Hoc Committee on Foreign Payments, The Association of the Bar of the City of New York, Report on Questionable Foreign Payments by Corporations: The Problems and Approaches to a Solution, note 4, at 25 (Mar. 14, 1977). A survey of bribery laws in 65 countries, including Nigeria, is set forth below:

COUNTRIES WITH LAW PENALIZING FOR LESS THAN 5 YEARS

Barbados	Iran	St. Lucia
Burundi	Israel	Saudi Arabia
Chile	Jamaica	Senegal (3)
Dominican Republic	Jordan	Sierra Leone (5)
Ethiopia	Liberia	Sudan (5)
Greece	Morocco	Tanzania (3)
Guatemala	Nicaragua	Togo (5)
Guyana	Pakistan	Western Samoa (3)
Honduras	Paraguay	Zaire (3)
India	Philippines	Zambia (3)

PENALTIES OF GREATER THAN 6 TO 10 YEARS

Argentina	Haiti	Singapore (7)
Bolivia	Indonesia	Sri Lanka (Ceylon) (7)
Brazil	Ivory Coast	Swaziland (7)
Cameroon	Kenya	Trinidad and Tobago (7)
China	Korea	Tunisia (10)
Colombia	Laos	Turkey (10)
Costa Rica	Malagasy Republic	Upper Volta (10)
Ecuador	Malaysia	Venezuela (8)

Egypt	Mali	Yemen Arab Republic (10)
El Salvador	Nigeria	Yugoslavia (10)
Grenada	Panama	
Guinea	Romania	

PENALTY OF 20 YEARS

Thailand

[The numbers in parenthesis indicate the maximum penalty in years]. To Require Certain Actions by the Overseas Private Investment Corporation: Hearings Before the Subcommittee on International Economic Policy of the House Committee on International Relations, 94th Cong. 2d Sess. 5 (1976).

While it often is difficult to determine exactly what constitutes a "bribe" under the laws of a particular country, payments to obtain or maintain government business almost invariably do so. *See* Prohibiting Bridges to Foreign Officials: Hearing on S.3133, S.3379, and S.3418 Before the Senate Comm. on Banking, Housing and Urban Affairs at 14-17 (testimony of Roderick Hills, Chairman of the Securities and Exchange Commission). John J. McCloy, Chairman of the Gulf Oil Special Review Committee which investigated questionable payments made by this major multinational, testified before the Senate Committee on Banking, Housing and Urban Affairs that the Gulf Committee "could not identify a single country where a bribe of a government official to induce a government to enter into a contract with any company for the supply of its product to that government was not illegal in that country." Senate Hearings on Foreign and Corporate Bribes, *supra*, at 6.

Bribery is generally viewed to be both politically debilitating and a national disgrace. Indeed, such was the reasoning of the Congress in deciding to promulgate the Foreign Corrupt Practices Act. President Carter, while signing the legislation, emphasized its basic policy considerations:

> I share in Congress's belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries.

13 Weekly Comp. of Pres. Doc. 1909 (Dec. 20, 1977). Thus, pursuit of this action would invariably prove humiliating to the Government of Nigeria since, if the plaintiff's allegations are true, it would involve the Nigerian Government publicly in actions which are internationally recognized as disgraceful. By showing that the government of Nigeria at one time engaged in internationally sanctioned conduct, this action touches upon and necessarily involves foreign relations with Nigeria. As discussed *supra*, the conduct of foreign relations is an executive concern, and this Court is barred from hearing this action, and thereby intervening in foreign relations by the Act of State doctrine.

Question 9

Who initiated the concept of the bribe, the defendants or the Nigerians?

Response to Question 9

Mr. Akindele initiated the concept to Kirkpatrick. Based on Mr. Akindele's statements, Kirkpatrick believes that officials and/or other representatives of the Nigerian Government initiated the concept to Mr. Akindele by making it clear to him that they would not consider any bid for the contract unless a commission was distributed to them.

Question 10

Is this type of pleading (specifically with regard to the allegations set forth in Paragraph 57 of the Amended Complaint) legally sufficient under the RICO setting?

Response to Question 10

The memorandum accompanying the Motion to Dismiss filed by Kirkpatrick on May 13, 1986 makes clear, on pages 16 to 18, that the allegations set forth in Paragraph 57 are conclusory, lack any basis in fact, and are legally insufficient.

ETC apparently makes these allegations in an effort to overcome the fact that the Amended Complaint fails to meet the pattern requirement of RICO set forth in 18 U.S.C. §1962(c). This section states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a *pattern of racketeering activity* . . . in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce (emphasis supplied).

In Section 1961(5), the words "pattern of racketeering activity" are defined to require at least two acts of racketeering activity. Recent decisions make clear that these acts must arise out of different criminal episodes. Acts that arise out of the same episode, such as separate payments of a single bribe, do not establish a pattern under RICO. *See, e.g., Savastano N. Thompson Medical Co., Inc.*, slip op. (S.D.N.Y. Aug. 1, 1986); *Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mutual Insurance Co.*, slip op., (E.D. Pa. July 17, 1986); *Wright v. Everett Cash Mutual Insurance Co.*, slip op., (W.D. Pa. June 20, 1986); *Kredietbank, N.V. v. Joyce Morris, Inc.*, slip op., (D.N.J. Jan. 9, 1986); *Soper v. Simmons International, Ltd.*, 632 F. Supp. 244 (S.D.N.Y. 1986); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, slip op., (W.D. Okla. August 30, 1985).

In the Amended Complaint, ETC apparently seeks to satisfy the pattern requirement of RICO by alleging that the commission requested by Mr. Akindele was paid in four separate transfers of money. These allegations are set forth in paragraphs 30 through 37. However, these allegations, even if true, fail to establish a pattern under RICO since each payment arose out of the same alleged crime.

In *Inryco*, for example, the court dismissed a complaint against a defendant on grounds that the complaint failed to allege a pattern as against him. The court there found that plaintiff's allegations that defendant's payments and mailings related to the same fraudulent scheme did not satisfy the pattern requirement. *Inryco, supra*, 615 F. Supp. at 831-33. The court stated:

> Surely the continuity inherent in the term [pattern] presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity." (emphasis original.)

Id. at 831.

CONCLUSION

In light of all the information currently before this Court, summary judgment should be granted against plaintiff.

Dated: August 27, 1986
New York, New York

Respectfully submitted,

SPENGLER CARLSON GUBAR
BRODSKY & FRISCHLING

/s/Thomas H. Sear

280 Park Avenue
New York, New York 10017
(212) 286-4000
Attorneys for Defendants
W.S. Kirkpatrick & Co., Inc.
and D.I.C. (Holding) Inc.

Of counsel:

Thomas H. Sear
Rhonda D. Orin
SPENGLER CARLSON GUBAR BRODSKY
& FRISCHLING

Lawrence S. Horn
SILLS BECK CUMMIS ZUCKERMAN
RADIN TISCHMAN & EPSTEIN
33 Washington Street
Newark, New Jersey 07102

NIGERIA

The Corrupt Practices Decree No. 38 of November 22, 1975[1] contains the following provisions concerning all federal offenses involving corruption of public officials, including bribery and extortion:

CORRUPT PRACTICES DECREE 1975

ARRANGEMENT OF SECTIONS

Section

Part I—Offences involving Corruption

1. Punishment of corruption.
2. Punishment of corrupt transaction with agents.
3. Increase of maximum penalty in certain cases.
4. Presumption of corruption in certain cases.
5. Acceptor of gratification to be guilty notwithstanding that purpose not carried out, etc.
6. Corruptly procuring withdrawal of tenders.
7. Bribery of member of the Supreme Military Council, the National Council of States or Federal Executive Council, etc.
8. Bribery of member of public body.
9. Penalty to be imposed in addition to other punishment.
10. Principal may recover amount of secret gift.

Part II—Establishment, Powers, etc. of Corrupt Practices Investigation Bureau

11. Establishment of Bureau.
12. General powers of investigation.
13. Director, etc. to have powers of a police officer.
14. Director's powers to obtain information.
15. Powers of search and seizure.
16. Director's power to order inspection of bankers' books.

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[1] Federal Republic of Nigeria Official Gazette Extraordinary, No. 59, Dec. 2, 1975.

17. Obstruction of search, etc.
18. Director to submit report of offences to the DPP.

Part III—Establishment, etc. of Tribunals and Trial of Offences
19. Constitution of special tribunals, etc.
20. Procedure for the trial of offences.
21. Evidence of pecuniary resources or property.
22. Evidence of accomplice.
23. Witness to be compellable in certain cases.
24. Protection of informers.

Part IV—Supplemental
25. Parties to offences.
26. Liability of citizens of Nigeria for offences committed outside Nigeria.
27. No conviction where gratification is proved customary.
28. Right of appeal to the Supreme Court.
29. Supplementary provisions.
30. Interpretation.
31. Citation.

A-184

Decree No. 38

[*22nd November 1975*]

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows:—

PART I

Offences Involving Corruption

Punishment of corruption.

1. Any person who by himself or by or in conjunction with any other person—

(*a*) corruptly solicits or receives or agrees to receive for himself or for any other person; or

(*b*) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,

any gratification as an inducement or reward for, or otherwise on account of—

(*i*) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or

(*ii*) any member, officer or servant of the government or any public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such government or public body in concerned;

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a

fine of five thousand naira or to both such imprisonment and fine.

Punishment of corrupt transaction with agents.

2. If—

(*a*) any agent corruptly accepts or obtains or agrees to accept or attempts to obtain, from any person for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Decree done or forborne to do, any act in relation to the affairs or business of his principal, or for showing favour or disfavour to any person in relation to the affairs or business of his principal; or

(*b*) any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Decree done or forborne to do any act in relation to the affairs or business of the principal or for showing or forbearing to show favour or disfavour to any person in relation to the affairs or business of the principal;

he shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Increase of maximum penalty in certain cases.

3. A person convicted of any offence under section 1 or 2 of this Decree shall, where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with the Government or any department thereof or with any public body or a sub-contract to execute

any work comprised in such a contract, be liable to imprisonment for a term of fourteen years or to a fine of ten thousand naira or to both such imprisonment and fine.

Presumption of corruption in certain cases.

4. Where is any proceedings against a person for an offence under section 1 or 2 of this Decree, it is proved that any gratification has been paid or given to or received by a person in the employment of the Government or any department thereof or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the Government or any department thereof or any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned unless the contrary is proved.

Acceptor of gratification to be guilty notwithstanding that purpose not carried out, etc.

5.—(1) Where in any proceedings against any agent for any offence under paragraph (*a*) of section 2 of this Decree, it is proved that he corruptly accepted, obtained or agreed to accept or attempted to obtain any gratification, having reason to believe or suspect that such gratification was offered as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person in relation to the affairs or business of his principal, he shall be guilty of an offence under that section notwithstanding that he did not have the power, right or opportunity so to do, show or forbear or that he accepted the gratification without intending so to do, show or forbear or that he did not in fact so do, show or forbear or that such act, favour or disfavour was not in relation to the affairs or business of the principal.

(2) Where in any proceedings against any person for any offence under paragraph (*b*) of section 2 of this Decree, it is proved that he corruptly gave, agreed to give or offered any gratification to any agent as an inducement or reward for doing

or forbearing to do any act or for showing or forbearing to show any favour or disfavor to any person having reason to believe or suspect that such agent had the power, right or opportunity so to do, show or forbear and that such act, favour or disfavour was in relation to the affairs or business of the principal, he shall be guilty of an offence under that section notwithstanding that such agent had no power, right or opportunity or that such act, favour or disfavour was not in relation to the affairs or business of the principal.

Corruptly procuring withdrawal of tenders.

6. A person—

(*a*) who, with intent to obtain from the Government or any public body a contract for performing any work, providing any service, doing anything, or supplying any article, material or substance, offers any gratification to any person who has made a tender for such contract, as an inducement or a reward for his withdrawing such tender; or

(*b*) who solicits or accepts any gratification as an inducement or a reward for his withdrawing a tender made by him for such a contract,

shall be guilty of an offence under this Decree and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Bribery of member of the Supreme Military Council, the National Council of States or the Executive Council, etc.

7. Any person—

(*a*) who offers any gratification to a member of the Supreme Military Council, the National Council of States or the Federal Executive Council or a member of the Executive Council of a State as an

inducement or reward for such member to do or forbear to do any act in his capacity as such member; or

(*b*) who, being a member of any of the Councils mentioned in paragraph (*a*) of this section, solicits or accepts any gratification as an inducement or reward for his doing or forbearing to do any act in his capacity as such member,

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for ten years or to a fine of ten thousand naira or to both such imprisonment and fine.

Bribery of member of public body.

8. Any person—

(*a*) who offers any gratification to a member of a public body as an inducement or reward for—

(*i*) such member to vote or abstain from voting at any meeting of such public body in favour or against any measure, resolution or question submitted to such public body; or

(*ii*) such member to perform or abstain from performing, or aid in procuring, expediting, delaying, hindering or preventing the performance of any official act; or

(*iii*) such member to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(*b*) who, being a member of a public body, solicits or accepts any gratification as an inducement or a reward for any such act, or any such abstaining,

as is referred to in sub-paragraphs (*i*), (*ii*) and (*iii*) or paragraph (*a*) of this section,

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of ten thousand naira or to both such imprisonment and fine.

Penalty to be imposed in addition to other punishment.

9. Where a tribunal convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Decree, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the tribunal shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the tribunal, the value of that gratification and any such penalty shall be recoverable as a fine.

Principal may recover amount of secret gift.

10.—(1) Where any gratification has, in contravention of this Decree, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or aquittal of the defendant in respect of an offence under this Decree shall operate as a bar to proceedings for the recovery of such amount or money value.

(2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property.

PART II

Establishment, Powers, etc. of Corrupt Practices Investigation Bureau

Establishment of Bureau.

11.—(1) There is hereby established as a department of the Government of the Federation a Bureau to be known as the Corrupt Practices Investigation Bureau.

(2) The Bureau shall consist of a Director and such number of Assistant Directors and other officers subordinate to the Director and Assistant Directors as the Supreme Military Council may from time to time determine.

( ) The Director and the Assistant Directors shall be appointed by the Supreme Military Council and the other officers of the Bureau shall be appointed by the Public Service Commission of the Federation on the recommendation of the Director.

(4) The officers of the Bureau other than the Director and the Assistant Directors shall be known by such title as the Director may determine and the Director shall issue to every such officer a certificate under his hand which shall be evidence of that officer's appointment under this Decree.

General powers of investigation.

12. Notwithstanding anything to the contrary in any law, the Director and any officer of the Bureau authorised in that behalf by the Director either generally or with respect to any category of matters, if satisfied that there are reasonable grounds for suspecting that an offence under this Decree has been committed by any person, may make an investigation in the matter in such manner or mode as the Director may deem fit.

Director, etc., to have powers of a police officer. Cap 43. Cap 30. Laws of Northern Nigeria 1963.

13. The Director, Assistant Directors and the officers of the Bureau designated by the Director shall by virtue of this section have all the powers of a police officer and, without prejudice to the generality of the foregoing, may exercise in relation to offences under this Decree the same powers as are exercisable by a police officer under the Criminal Procedure Code in respect of offences under the Criminal Code, or as the case may be, the Penal Code.

Director's powers to obtain information. Cap. 42. Cap. 89.

14.—(1) In the course of any investigation or proceedings into or relating to an offence under this Decree by any person in the service of the Government or of any department thereof or of any public body under this Decree the Director may, notwithstanding anything to the contrary in any other law, by written notice—

(*a*) require any such person to furnish a sworn statement in writing enumerating all moveable or immovable property belonging to or possessed by such person and by the spouse and children of such person, and specifying the date on which each of the properties enumerated was acquired whether by way or purchase, gift, bequest, inheritance or otherwise;

(*b*) require any such person to furnish a sworn statement in writing of any money or other property sent out of Nigeria by him or paid or delivered to him or to his account outside Nigeria during such period as may be specified in the notice;

(*c*) require any other person to furnish a sworn statement in writing enumerating all moveable or immovable property belonging to or possessed by such person where the Director has reasonable

grounds to believe that such information can assist the investigation;

(*d*) require the person in charge of any department, office or establishment of the Government, or the chairman, chief executive, manager or similar officer of any public body to produce or furnish, as specified in the notice, any document or a certified copy of any document which is in his possession or under his control;

(*e*) require the manager of any bank to give copies of the accounts of such person or of the spouse or child of such person at the bank.

(2) Every person to whom a notice is sent by the Director under subsection (1) of this section shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of that notice within such time as may be specified therein and any person who willfully neglects or fails so to comply shall be guilty of an offence under this Decree and shall be liable on conviction to imprisonment for one year or to a fine of one thousand naira or to both.

Powers of search and seizure.

15.—(1) Whenever it appears to the Director upon information and after such enquiry as he thinks necessary that there is reasonable cause to believe that in any place there is any document containing any evidence of the commission of an offence under this Decree or any article or property relating to the commission of an offence under this Decree the Director may, by warrant directed to any officer of the Bureau, empower the officer named therein to enter such place by force if necessary and search for, seize and detain any such document, article or property.

(2) Whenever it appears to any officer of the Bureau other than the Director, that there is reasonable cause to believe

that in any place there is concealed or deposited any document containing evidence of the commission of an offence under this Decree and the officer as aforesaid has reasonable grounds for believing that by reason of the delay in obtaining a warrant the object of the search is likely to be frustrated, that officer may exercise in and in respect of such place all the powers mentioned in subsection (1) of this section in as full and ample a manner as if he were empowered to do so by warrant issued under the said subsection.

Director's power to order inspection of bankers' books.

16.—(1) The Director may, if he considers that any evidence of the commission of an offence under this Decree by any person in the service of the Government or of any department thereof or of a public body is likely to be found in any banker's book relating to such person, his wife or child or to a person reasonably believed by the Director to be a trustee or agent for such person, by order under his hand authorise any officer of the Bureau named in the order to inspect any such book and the person so authorised may, at all reasonable times, enter the bank specified in such order and inspect such books kept therein and may take copies of any relevant entry in any such book.

(2) For the purpose of this section—

"bank" has the same meaning as in section 41 of the Banking Decree 1969 and, for the avoidance of doubt, includes any bank exempted from the provisions of that Decree;

"banker's book" includes ledgers, day books, cash books, account books and all other books and documents used in the ordinary course of the business of a bank.

Obstruction of search, etc.

17. Any person who—

(*a*) refuses the Director or any person duly authorised for that purpose by the Director access to any place; or

(*b*) assaults, obstructs, hinders or delays him in effecting any entrance which he is entitled to effect under this Decree, or in the execution of any duty imposed or power conferred by this Decree; or

(*c*) fails to comply with any lawful demands of the Director or of any officer of the Bureau authorised by the Director to make such demands in the execution of his duty under this Decree; or

(*d*) refuses or neglects to give any information which may reasonably be required of him and which he has it in his power to give,

shall be guilty of an offense under this Decree and shall be liable on conviction to a fine of one thousand naira or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Director to submit report on offences to the DPP.

18. On the completion of an investigation in respect of any offence under this Decree the Director shall cause to be delivered to the Director of Public Prosecutions a report of his findings in the matter and shall when required to do so by the Director of Public Prosecutions furnish to the Director of Public Prosecutions all evidence in his custody or under his control that may be required by the Director of Public Prosecutions for the institution of proceedings before a tribunal under this Decree.

PART III

Establishment, etc. of Tribunals and Trial of Offences

Constitution of special tribunals, etc.

19.—(1) The Head of the Federal Military Government shall, whenever occasion demands, constitute one or more tribunals for the trial of offences under this Decree.

(2) A tribunal constituted under subsection (1) of this section shall consist of a chairman who shall be a judge of the High Court of a State or of the Federal Revenue Court and two other persons at least one of whom shall be an officer in the Nigerian Army not below the rank of major or an officer of the Nigerian Navy or Air Force of equivalent rank.

Procedure for the trial of offences.

20.—(1) The trial of offences under this Decree shall commence by way of application, supported by evidence on affidavit, made to the tribunal in that behalf by the Director of Public Prosecutions or by such officers subordinate to him as the Director of Public Prosecutions may authorise to do so:

Provided that the question whether any authority has been given in pursuance of this subsection or what the authority was, shall not be enquired into by any person except at the instance of the Director of Public Prosecutions.

(2) Whereafter perusal of the application and the evidence on affidavit or any further evidence in such form as the tribunal may consider necessary the tribunal is satisfied that any person appears to have committed any offence under this Decree, it shall cause notice to be served on that person calling upon him to show cause why he should not be punished for that offence.

(3) Where no cause or no sufficient cause under subsection (2) above is shown by the person on whom a notice is served under that subsection to its satisfaction, the tribunal

may, after such inquiry as the tribunal may consider necessary, convict that person of the offence and impose upon him an appropriate sentence in accordance with the provisions of this Decree.

(4) The procedure to be followed upon an application to the tribunal under subsection (1) above shall be in accordance with such rulings as the tribunal may make either generally or for the purpose of a particular trial; and in relation to and for the purpose of proceedings of the tribunal the tribunal shall have the same powers, whether of compelling the attendance of persons and the production of documents or otherwise, as the High Court of a State has in the exercise of its ordinary jurisdiction.

(5) An offender under this Decree shall be entitled to defend himself in person or by a person of his own choice who is a legal practitioner, and to examine in person or by his legal practitioner, if he so wishes, any person whose evidence on affidavit or otherwise forms part of the case against him.

Evidence of pecuniary resources or property.

21.—(1) In any trial for an offence under this Decree the fact that an accused person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the time of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the tribunal as corroborating the testimony of any witness in such trial or inquiry that such accused person accepted or obtained any gratification and as showing that such gratification was accepted or obtained corruptly as an inducement or reward.

(2) An offender shall, for the purposes of subsection (1) of this section be deemed to be in possession of resources of property or to have obtained an accretion thereto where such resources or property are held or such accretion is obtained by

any other person whom, having regard to his relationship to the accused person or to any other circumstances, there is reason to believe to be holding such resources or property or to have obtained such accretion in trust for or on behalf of such accused person or as a gift from such accused person.

Evidence of accomplice.

22. Notwithstanding anything to the contrary in any law (including any rule of law), no witness shall, in any such trial or inquiry as is referred to in section 20 of this Decree, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

Witness to be compellable in certain cases.

23.—(1) Whenever two or more persons are charged with an offence under this Decree the tribunal may require one or more of them to give evidence as a witness for the prosecution.

(2) Any person who refuses to be sworn or to answer any lawful question after having been required to do so pursuant to subsection (1) above may be dealt with in the same manner as a witness so refusing may be dealt with by a High Court.

(3) Any person required to give evidence under this section and who in the opinion of the tribunal makes true and full disclosure of all things as to which he is lawfully examined shall be entitled to receive a certificate of indemnity under the hand of the chairman of the tribunal, stating that he has made a true and full disclosure of all things as to which he was examined, and such certificate shall be a bar to all legal proceedings against him in respect of all such things aforesaid.

Protection of informers.

24.—(1) Except as hereinafter provided, no complaints as to an offence under this Decree shall be admitted in evidence or liable to inspection in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer or state any matter which might lead to his discovery.

(2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named, described or which might lead to his discovery the tribunal, before which the proceeding is held, shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.

(3) If on a trial for any offence under this Decree the tribunal, after full inquiry into the case, is of opinion that the informer willfully made in his complaints a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the tribunal is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the tribunal may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer:

Provided, however, that where the Director of Public Prosecutions certifies in writing that it is not in the public interest to make such a disclosure the tribunal shall not, notwithstanding any rule of law to the contrary, permit any such inquiry or disclosure of the informer.

PART IV –

Supplementary

Parties to offences.

25. Any person who—

(*a*) aids, counsels, abets or procures any person to commit an offence under this Decree, or

(*b*) conspires with any person to commit such an offence, whether or not he is present when the offence is committed or attempted to be committed,

shall be deemed to the guilty of the offence as a principal offender and shall be liable to be proceeded against and punished accordingly under this Decree.

Liability of citizens of Nigeria for offences committed outside Nigeria.

26. The provisions of this Decree shall, in relation to citizens of Nigeria, have effect outside as well as within Nigeria, and where an offence under this Decree is committed by a citizen of Nigeria in any place outside Nigeria he may be dealt with in respect of such offence as if it had been committed within Nigeria:

Provided that any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the offence, if such offence had been committed in Nigeria, shall be a bar to further proceedings against him, under any written law for the time being in force relating to the extradition of persons, in respect of the same offence outside Nigeria.

No conviction where gratification is proved customary.

27.—(1) Subject to subsection (2) of this section, no person charged with any offence under this Decree being an offence involving the receipt of gratification shall be convicted of that offence if he proves that the receipt of the gratification is customary in his profession, trade, vocation or calling and the tribunal is satisfied that the amount of the gratification was reasonable in the circumstances of the case.

(2) Subsection (1) of this section shall not apply in respect of any offence by a person in the employment of the Government or any department thereof or of any public body.

Right of appeal to the Supreme Court.

28. Any person convicted of an offence under this Decree may within 30 days of the date of his conviction appeal as of right to the Supreme Court and the provisions of any enactment (including rules of court) regulating the practice and procedure of the Supreme Court shall, with any necessary modifications, apply in respect of such an appeal as they apply in respect of appeals from the decisions of any court subordinate to the Supreme Court.

Supplementary provisions

29.—(1) It is hereby declared that a tribunal shall, notwithstanding anything to the contrary in any law (including the Constitution of the Federation or of a State) have the power in appropriate cases to award the punishments and impose the penalties specified in this Decree.

(2) No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any matter or thing done or proposed or purported to be done under this Decree by the Head of the Federal Military Government or by any person acting in accordance with the authority of the Head of the Federal Military Government or by the Director or any other

officer of the Bureau or by any member or other officer of a tribunal constituted under this Decree.

(3) The question whether any provision of Chapter III of the Constitution of the Federation has been, is being or would be contravened by anything done or proposed or purported to be done in pursuance of this Decree shall not be inquired into by any court of law.

Interpretation:

30. In this Decree, unless the context otherwise requires—

"agent" means any person employed by or acting for another and includes a trustee, administrator and executor, and a person serving the Government or under any corporation or public body, and for the purposes of section 4 of this Decree, includes a sub-contractor and any person employed by or acting for such sub-contractor;

"Director" means the Director of the Corrupt Practices Investigation Bureau appointed under section 11 of this Decree;

"the Government" means the Government of the Federation or of a State;

"gratification" includes—

(*a*) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether moveable or immoveable;

(*b*) any office, employment or contract;

(*c*) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;

(*d*) any other service, favour or advantage of any description whatsoever, including protection from any penalty or liability incurred or apprehended of from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and

(*e*) any offer, undertaking or promise of any gratification within the meaning of the preceding paragraphs (*a*), (*b*), (*c*) and (*d*);

"principal" includes an employer, a beneficiary under a trust, and a trust estate as though it were a person and any person beneficially interested in the estate of a deceased person as though the estate were a person and in the case of a person serving the Government or a public body includes the Government or the public body as the case may be;

"public body" means any corporation directly established by law and includes any corporate body established or deemed to be established under the Companies Decree 1968 in respect of which the Government holds any shares, stocks or debentures;

"tribunal" means any tribunal constituted under this Decree.

Citation.

31. This Decree may be cited as the Corrupt Practices Decree 1975.

MADE at Lagos this 22nd day of November 1975.

Brigadier M.R. Muhammed,
Head of the Federal Military Government,
Commander-in-Chief of the Armed Forces,
Federal Republic of Nigeria

EXPLANATORY NOTE

(This note does not form part of the above Decree but is intended to explain its purport)

The Decree, designed for the suppression of corrupt practices in both the public and private sectors, provides stiff penalties for any person found guilty of bribery and corruption but makes exception for bona fide customary gifts.

It sets up an autonomous Government department to be known as the Corrupt Practices Investigation Bureau, which will be headed by a Director, as the body responsible for investigating all allegations of corruption after which reports would be submitted to the Director of Public Prosecutions who will be responsible for prosecuting cases.

Such cases would be tried by special *ad hoc* tribunals comprising a judge of the High Court of a State or of the Federal Revenue Court and two other members, one of whom shall be drawn from the armed forces. Persons convicted by any such tribunal have a right of appeal to the Supreme Court.

The Penal Code Law, 1959[2] of the Northern Region of Nigeria provides the following in regard to bribery and extortion of public officials in that region:

CHAPTER X—OFFENCES BY OR RELATING TO PUBLIC SERVANTS

115. Whoever being or expecting to be a public servant accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever whether pecuniary or otherwise, other than lawful remuneration, as a motive or reward—

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[2] 1 *Annual Volumes of the Laws of the Northern Region of Nigeria 1959* A85-A88 (1960).

(*a*) for doing or forbearing to do any official act; or

(*b*) for showing or forbearing to show in the exercise of his official functions favour or disfavour to any person; or

(*c*) for rendering or attempting to render any service or disservice to any person with any department of the public service or with any public servant as such,

shall be punished—

(*i*) with imprisonment for a term which may extend to seven years or with fine or with both;

(*ii*) if such public servant is a public servant in the service of the Government of the Northern Region or of the Government of the Federation acting in a judicial capacity or carrying out the duties of a police officer, with imprisonment for a term which may extend to fourteen years or with fine or with both.

116. Whoever accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever whether pecuniary or otherwise as a motive or reward for inducing by corrupt or illegal means any public servant—

(*a*) to do or forbear to do any official act; or

(*b*) in the exercise of the official functions of such public servant to show favour or disfavour to any person; or

(*c*) to render or attempt to render any service or disservice to any person with any department of the public service or with any public servant as such,

shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

117. Whoever being a public servant, in respect of whom an offence under section 116 is committed, abets the offence, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

118. Whoever offers or gives or agrees to give any gratification whatever whether pecuniary or otherwise in the circumstances and for any of the purposes mentioned in sections 115 and 116 shall be punished with imprisonment which may extend to three years or with fine or with both.

119. Whoever being a public servant accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person any valuable thing without consideration or for a consideration which he knows to be inadequate—

(*a*) from any person whom he knows to have been or to be or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant or having any connection with the official functions of himself or of any public servant to whom he is subordinate; or

(*b*) from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with imprisonment for a term which may extend to five years or with fine or with both.

120. Whoever in any of the circumstances mentioned in section 119 offers or gives or agrees to give to any public servant or to any person, in whom a public servant is interested or to whom he is related, any valuable thing without consideration or for a consideration which he knows to be inadequate, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

121. Whoever knowingly profits by any gratification or benefit obtained in any of the circumstances mentioned in section 115, 116 or 119 but does not take any active part in

obtaining such gratification or benefit, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

The following sections of Part 3, Chapter 12 of the Criminal Code Act[3] pertain to bribery and extortion of public officials in the six southern states of Nigeria, excluding Lagos state:

98. Any person who—

(1) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, not being a duty touching the administration of justice, corruptly asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or

(2) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for, any person employed in the public service, or to, upon, or for, any other person, any property or benefit, of any kind on account of any such act or omission on the part of the person so employed,

is guilty of a felony, and is liable to imprisonment for seven years.

99. Any person who, being employed in the public service, takes, or accepts from any person, for the performance of his duty as such officer, any reward beyond his proper pay

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[3] Brett and McLean's *The Criminal Law and Procedure of the Six Southern States of Nigeria* 555, 557-558 (2d ed. 1974).

and emoluments, or any promise of such reward, is guilty of a felony, and is liable to imprisonment for three years.

100. Any person who, being employed in the public service, receives any property or benefit of any kind for himself, on the understanding, express or implied, that he shall favour the person giving the property or conferring the benefit, or any one in whom that person is interested, in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or any one in whom he is interested, and any person employed in the public service, is guilty of a misdemeanour, and is liable to six months' imprisonment.

Lagos state applies the following provisions in regard to bribery and extortion of public officials:[4]

98. (1) Any public official (as defined in section 98D) who—

(*a*) corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or

(*b*) corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person,

on account of—

(i) anything already done or omitted, or any favour or disfavour already shown to any person, by himself in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a government department, public body or other organisation or institution in which he is serving as a public official, or

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[4] *Id.* at 559-562

(ii) anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by himself in the discharge of his official duties or in relation to any such matter as aforesaid,

is guilty of the felony of official corruption and is liable to imprisonment for seven years.

(2) If in any proceedings for an offence under this section it is proved that any property or benefit of any kind, or any promise thereof, was received by a public official, or by some other person at the instance of a public official, from a person—

(i) holding, or seeking to obtain, a contract, licence or permit from a government department, public body or other organisation or institution in which that public official is serving as such; or

(ii) concerning or likely to be concerned, in any proceeding or business transacted, pending or likely to be transacted before or by that public official or a government department, public body or other organisation or institution in which that public official is serving as such,

or by or from any person acting on behalf of or related to such a person, the property, benefit or promise shall, unless the contrary is proved, be deemed to have been received corruptly on account of such a past or future act, omission, favour or disfavour as is mentioned in subsection (1) (i) or (ii).

(3) In any proceedings for an offence under this section to which subsection (1) (ii) is relevant it shall not be a defence to show that the accused—

(*a*) did not subsequently do, make or show the act, omission, favour or disfavour in question; or

(*b*) never intended to do, make or show it.

(4) Without prejudice to subsection (3), where a police officer or other public official whose official duties include the prosecution, detention or punishment of offenders is charged with an offence under this section in connection with—

(*a*) the arrest, detention or prosecution of any person for an alleged offence; or

(*b*) an omission to arrest, detain or prosecute any person for an alleged offence; or

(*c*) the investigation of an alleged offence,

it shall not be necessary to prove that the accused believed that the offence mentioned in paragraph (*a*), (*b*) or (*c*), or any other offence, had been committed.

98A. (1) Any person who—

(*a*) corruptly gives, confers or procures any property or benefit of any kind to, on or for a public official (as defined in section 98D) or to, on or for any other person; or

(*b*) corruptly promises or offers to give or confer or to procure or attempt to procure any property or benefit of any kind to, on or for a public official or to, on or for any other person,

on account of any such act, omission favour or disfavour on the part of the public official as it mentioned in section 98 (1) (i) or (ii), is guilty of the felony of official corruption and is liable to imprisonment of seven years.

(2) If in any proceedings for an offence under this section it is proved that any property or benefit of any kind, or any promise thereof, was given to a public official, by a person—

(i) holding, or seeking to obtain, a contract, licence or permit from a government department, public body or other organisation or institution in which that public official is serving as such; or

(ii) concerning, or likely to be concerned, in any proceeding or business transacted, pending or likely to be transacted before or by that public official or a government department, public body or other organisation or institution in which that public official is serving as such,

or by or from any person acting on behalf of or related to such a person, the property, benefit or promise shall unless the contrary is proved be deemed to have been given corruptly on account of such a past or future act, omission, favour or disfavour as is mentioned in section 98(1) (i) or (ii):

98B (1) Any person who—

(*a*) corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or

(*b*) corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person,

on account of—

(i) anything already done or omitted, or any favour or disfavour already shown to any person, by a public official (as defined in section 98D) in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business or business of a government department, public body or other organisation or institution in which the public official is serving as such; or

(ii) anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by a public official in the discharge of his official duties or in relation to any such matter as aforesaid,

is guilty of the felony of official corruption and is liable to imprisonment for seven years.

(2) In any proceedings for an offence under this section it shall not be necessary to prove—

(*a*) that any public official counselled the commission of the offence; or

(*b*) that in the course of committing the offence the accused mentioned any particular public official; or

(*c*) that (in a case to which subsection (1) (ii) is relevant) the accused believed that any public official would do, make or show the act, omission, favour or disfavour in question; or

(*d*) that the accused intended to give the property or benefit in question, or any part thereof, to a public official.

Prepared by Edward Sourian
Senior Legal Specialist
Near Eastern and African Law Division
Law Library, Library of Congress
June 1976

A-212

INTER-OFFICE MEMORANDUM

March 30, 1981

To: R.H. Edwards

From: H.G. Carpenter

Subject: Visit to London with Ross Saxon, Chairman of Nautilus Environmentals, Inc. and separate conferences with Benson H. Akindele and Alhaji A. Ringim

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As I had done with Bob Ruppert, I felt that it would be important to keep Ross Saxon fully informed in these negotiations. Because of its highly technical nature, both Saxon and Ruppert will probably have to visit Nigeria again, and will have detailed conferences with the customer. Therefore, we must presume that there will be full disclosure, especially since we met Akindele through Bob Ruppert.

Ross Saxon was very helpful, and he suggested that Kirkpatrick work on no less than a 15% markup from the manufacturers' prices, and that additionally Nautilus had included a further 3% in the NEI portion of $5,144,903, which was the price he brought with him for this trip. This was encouraging since Ruppert had told me he thought that Kirkpatrick should add on 20% — therefore, both manufacturers are not trying to squeeze us in any way and are giving us complete support.

At the first meeting with Benson Akindele, we spent all of the necessary time giving him all of the massive technical brochures that we brought with us. Everything was explained in complete detail, and he was completely satisfied. It was simply left that there would probably be required a trip to Lagos by myself or someone from Kirkpatrick, plus Saxon and Ruppert, at some point in April or early May to finalize technical questions.

We then got into the pricing, and we told Benson that his cost or the cost that Kirkpatrick was proposing approximated $7,525,000 (actually Ross and I had worked up an FAS packed for export quotation from all three manufacturers of $6,543,655, and then had added a 15% margin for Kirkpatrick of $981,548, which comes to $7,525,203. Please bear in mind that the Kirkpatrick margin should be increased by an additional $154,347, which was the 3% included by NEI as described above). We then told him that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project "over the top".

We then told Akindele that this meant that our quotation would have to be in the area of $9,400,000. He replied to us that the reason for his week's delay in coming to London was to have a chance to have a secret look at the other two quotations made by European concerns, and that there should be no problem for us to up our quotation so that the total CIF Nigeria price would come to approximately $10,750,000.

Ross and I then went back to the hotel, and Ross re-calculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus, and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. Benson Akindele has called Nigeria on Monday morning to get the approximate costs of unloading all of the material in Lagos and trucking it to Kaduna [?]

At this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their

profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.

Ross and I then went to see Ringim at his flat in London, and left with him a copy of the quotation that we had typed up that afternoon, plus one of the big folders. Ringim assured us of his cooperation. Obviously, he wanted to discuss the commission breakdown since he was thinking in terms of receiving some 10% of the commission, and asked that Akindele meet him in Lagos at his hotel Sunday night, March 29th, at 9 P.M. to talk it over.

When we got back to our hotel, called Akindele, and left this information with him, he then advised me that he was reticent about bringing Ringim into the act too soon. He stated that this was really his deal, and that he had to do all of the preliminary work through various technical levels up through the Department of Defense and at that time he would call on Ringim. I told him that this was a matter of judgment but that I thought we must coordinate with Ringim and not let him have the feeling that he might be leaving him out. Obviously, I am not sure what Akindele is going to do here. He agrees that Ringim will be necessary at some point, but is wary of getting him involved too quickly.

The final conference that I had with Akindele was in the company of his very experienced English lawyer, Mr. Jeffrey Tesler, of the firm of Michael D. Kaye & Co. Tesler is very knowledgeable on Nigerian affairs since he and his partners maintain an office in Lagos, and also about the problems of U.S. companies re commission payments. The problem for all American concerns is that Europeans readily provide such high commissions, as required and asked for by the customers, without any government interference. In fact, Mr. Tesler stated what I had heard repeatedly from other sources that the French will pay commissions of 25% on projects that they bid, and that the entire commission will be paid up front after receipt of the contract, the letter of credit and the down payment.

Mr. Tesler stated that he would be in touch with Ken Kunzman, and that the 20% commission would be broken down into two components:

1. 10% for a company based on direct relations and assistance to achieve this contract. It will be a 5 to 6 page agreement form provided, listing the services this organization is to provide. It is a bearer share corporation.

2. A firm retained by us to do research and long term marketing planning for Western Africa covering approximately 10% of the commission for this contract. Again a bearer share corporation with full details as to the services they are to provide included in the agreement form.

I told him that I did not think we would have problems with 1 and 2 above, but that we would have problems with what he next brought forward. Mr. Tesler said that it would be necessary that the commissions paid out would include more than the pro rata share that we would receive on advance payments. In fact, Mr. Akindele was requesting that Kirkpatrick provide $50,000 for advance expenses, and that "you should consider this as an investment". I told him that we had never ever taken action of this type and doubted very much that our Board would authorize such expenditures in this case, regardless of the size of this contract. Tesler then said he was going to ask Kunzman that we provide promissory notes dated 3 months, 6 months, 9 months, and 12 months in advance for approximately the total amount due, which his customer could then discount.

Finally, Tesler said that they would request that we have a bank outside the U.S. guarantee our commitment. I informed both Tesler and Akindele that these requests were extraordinary and had never been presented to us before, and that it was highly unlikely that we would consider them favorably. In any event, we should be receiving a letter shortly from Jeffrey Tesler outlining their terms for this agreement.

In my final conversation with Akindele, he pointed out his problems in Nigeria. He said he had to go back and deal with all of the principals, and assure them that he had created a solid arrangement with Kirkpatrick to insure that their ambitions would be met, and that this was the reason for these various specifications that Mr. Tesler had outlined to me. I in turn told him that we had been in business since 1946 and had not existed and prospered this long if we had been going around the world "screwing" people, and that it was probable that they were going to have to entertain this agreement based on our past reputation.

I think this project can be worked out, but like everything else, it is delicate.

H. G. Carpenter

HGC/jz

A-217

Confidential

INTER-OFFICE MEMORANDUM

March 8, 1982

To: R. Edwards
J. Krankel

From: H. G. Carpenter

Subject: Visit with Alhaji Ringim - March 5, 1982

Had a good visit with Alhaji Ringim today. He is an honorable person and came out here to update the aeromedical project in Nigeria as far as his commission was concerned. He said he would appreciate it if I would give him a letter which he could show to his friends in the Air Force, confirming that he was to get a commission that he could reimburse them. He went on to say that it was not so much that he wanted to get a commission for himself, but that he did have these air force leaders that he had approached in our behalf. He mentioned Air Vice Marshal Bello, the Commander in Chief of the Air Force, Air Commodore Imman and Air Commodore Yahayah, as well as Group Capt. or Air Cdre. Hamzeh, the air force commander in Kaduna.

He stated that after he had received a copy of our proposal in March of 1981, he had gone ahead and told these four men that he was involved in this project, that he wanted it to go through, and that they could count on his cooperation (otherwise, some commission). In his presence, he said Bello called Yahayah on the phone and told him that he was in favor of the thing and to proceed. Ringim said at this point he has absolutely nothing in hand which will allow him to have any confidence that he is going to participate in this program.

I told Ringim that I could not give him a letter since we had made a full commitment and appointment of Tunde from the beginning, and that his participation must come through that source. Ringim's reply was that he, therefore, felt it was definitely necessary for a meeting to take place between himself, Tunde and me so that there would be no misgivings or misunderstandings. He went on to say that he is going back to London this Sunday and will be there until the 14th, when he will go to Kano. From there, he will plan to be in Lagos on the 16th or 17th when the projected signing will take place. At that time he said he will work hard to make sure that the contact gets out of Defense and into Finance so that the letter of credit can be opened up immediately.

Because this is certainly going to become a problem in time, I decided to re-test my memory and put down exactly what I knew to be the facts since over one year has elapsed during the beginning of this project.

When Tunde insisted that Bob Ruppert come to Lagos in February of 1981, there is no question that he was the quarterback and originator of this project. When we got there, Ruppert and I had a long talk with Tunde one night, and told him that we wanted to be sure that he had the wherewithal to carry a project of this magnitude through the entire government. I explained our long association with Alhaji Ringim and the fact that he was a member of the Hausa party, and that it might very well be necessary for him to be involved in this program in order to make sure it got through. At that time Tunde had never had any experience of taking a project all the way through Defense. He explained that he felt he was only at the air force level and into Defense, but might need help at the top level of Defense and in getting it through the presidential arena.

I then suggested that it would be a good time to go and meet Alhaji Ringim. The first night we arrived, I had taken Bob Ruppert to meet Ringim since we were both staying at the Federal Palace Suites Hotel. Ruppert, of course, was very impressed with Ringim who is certainly a competent

performer. After Ruppert and I had our talk with Tunde, I then took Tunde with me and we visited Ringim together. At that time it was pointed out that the project was with Tunde, but that we might need assistance downstream. Ringim told Tunde that he should handle the project at the lower level but that he did have contacts at the highest levels of the Air Force, and then pointed out that it would be necessary as a Hausa to get the thing through the presidential office. No commitments were made but certainly there was no doubt that a relationship was implied, and I definitely recall it was left that Ringim told Tunde — you call me when the time comes. Ringim is of a higher station than Tunde, and that is always his modus operandi, anyway — telling people to call him.

Tunde from the beginning was nervous about Ringim since he was afraid that Ringim would require too big a piece of the action, but he did acknowledge that Ringim may be needed later on and that he certainly would utilize him. That is my exact impression of that initial conference, and Ruppert and I talked about the fact that Ringim certainly would be a valuable addition to the program when it got down to the final tough moments.

Subsequently, Ross Saxon and I went together to London in March of 1981 to present the full quotation. My memorandum of March 30th to Bob Edwards spells it out, but let me quote from the last paragraph of page 1:

> "We then told him (Akindele) that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project 'over the top'."

On page 2, let me again pick up my memorandum which was made at that time.

> "Ross and I then went back to the hotel, and Ross re-calculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus, and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. Benson Akindele had called Nigeria on Monday morning to get the approximate costs of unloading all of the material in Lagos and trucking it to Kaduna.
>
> "At this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.
>
> "Ross and I then went to see Ringim at his flat in London, and left with him a copy of the quotation that we had typed up that afternoon, plus one of the big folders. Ringim assured us of his cooperation. Obviously he wanted to discuss the commission breakdown since he was thinking in terms of receiving some 10% of the commission, and asked that Akindele meet him in Lagos at his hotel Sunday night, March 29th, at 9 P.M. to talk it over.
>
> "When we got back to our hotel, called Akindele, and left this information with him; he then advised me that he was reticent about

> bringing Ringim into the act too soon. He stated that this was really his deal, and that he had to do all of the preliminary work through various technical levels up through the Department of Defense and at that time he would call on Ringim. I told him that this was a matter of judgment but that I thought we must coordinate with Ringim and not let him have the feeling that he might be leaving him out. Obviously, I am not sure what Akindele is going to do here. He agrees that Ringim will be necessary at some point, but is wary of getting him involved too quickly."

Ross confirmed this afternoon that his recollection was that there was never a commitment given to Ringim as to the commission, but that it was implied that he would be included, and it was left that he was to discuss the matter with Akindele and, as usual, Ringim always left it that Akindele was to call him.

In September, when Ross and I were down negotiating the final contract, Ross recalls as we went through the stages of how much is the commission and the breakdown of it, that on more than one occasion I mentioned to him that Ringim must be taken care of and that Akindele acknowledged it, although there was never any specific amount mentioned. During that September visit, Akindele gave me a breakdown of what the overall 20% commission would constitute. It came down to the following:

2 1/2 - for Akindele
5 - for air force
2 1/2 - medical group
5 - party
2 1/2 - minister himself
2 1/2 - other key defense personnel

It would seem that somewhere along the line we're going to have to sit down with Tunde and Ringim relative to the amount

for the air force. If there has been 5% included for the air force, we can't get sucked into the situation where both are claiming a need to make payment to air force personnel. I am only going through this situation in great detail because whether it is me or somebody else in the company, we have to have our facts in order and our recollection straight when this situation has to be finalized.

H. G. Carpenter

HGC/jz

Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated. In reading Mr. Sear's sentencing memorandum, your Honor, I got the impression that Foreign Corrupt Practices Act is somehow not effective or maybe somehow not needed, but I can say that the government of Nigeria as well as the State Department have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain evidence about who possibly received the payments which are set forth in the memoranda that Mr. Carpenter wrote to other senior officers of the corporation.

I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State department has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.

This is not a case where there is not a victim. Shagari, who is the president of Nigeria at the time of this contract is now under house arrest. Some of these other individuals and I can name them if the Court is interested, are a very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names, and I think the reason for the enactment of the Foreign Corrupt Practices Act is in part because of the devastating political impact that payments on corruption has, and I think that is present in this case as well, on the Government.

The Government is interested in, without calling for a specific figure, the Government is interested in a fine that would send a clear signal to the business community, in New Jersey and else where, that the Foreign Corrupt Practices Act is important and that the purposes which led to the enactment of the Foreign Corrupt Practices Act are very valid and to be

given weight and that this type of conduct will not be permitted in the business community.

Now, that is all I have, your Honor.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 85-415

UNITED STATES OF AMERICA, :

v. :

Sentencing

W.S. KIRKPATRICK & CO., INC., :

:

Defendant.

January 6, 1986
Trenton, New Jersey

BEFORE:

THE HONORABLE JOSEPH RODRIGUEZ, U.S.D.J.

APPEARANCES:

THOMAS W. GREELISH, U.S. ATTORNEY
FOR THE DISTRICT OF NEW JERSEY,
BY: STEVEN LEVY, , A.U.S.A.,
For the Government.

SPENGLER, CARLSON, GUBAR, BRODSKY & FRISCHLING
BY: THOMAS H. SEAR, ESQ. (N.Y. Bar)
For the Defendant.

THE COURT: All right. We are here this afternoon for the court schedule of the sentencing of W. S. Kirkpatrick & Company. Are you ready?

MR. LEVY: Yes, your Honor, the United States is ready.

MR. SEAR: Yes.

THE COURT: May we have your appearances for the record?

MR. LEVY: For the United States, your Honor, my name is Steve Levy, L-e-v-y.

MR. SEAR: Your Honor, my name is Thomas H. Sear, and my associate here is Miss Rhonda Horn and Mr. Larry Horn, also has been involved in this matter, and as your Honor will recall, introduced me to the Court the last time, I believe.

THE COURT: Yes.

THE COURT: Mr. Sear, do you want to proceed?

MR. SEAR: Yes, your Honor.

I will attempt to be brief. I have made that promise in the past and not carried it through on, but I think I can do a better job of that this afternoon because we have attempted to put, to the best of our ability, all the information that we thought was relevant and necessary before the Court in our presentence memo.

And the two reasons for my standing up right now are, number one, if your Honor has any questions about any of the matters that we put forward or any other aspect of the case, I will be happy to respond to an inquiry by your Honor. And secondly, I just wanted to emphasize certain of the critical points that we think counsel for a lenient, fair, reasonable, merciful sentence in this matter.

And I suppose it seems a little bit strange talking about being merciful when you are dealing with a corporation which is a nonhuman entity, but I would suggest to your Honor that the real sentence that is going to take place here this afternoon is of the individuals, the people who are with W. S. Kirkpatrick & Company, Inc.

As we have indicated, since 1984, the status and the critical difficulties of the corporation have resulted in some 28 jobs being eliminated, but at present there are 28 individuals from the present chief executive on down who are attempting to turn this situation around, put this very tragic and troubling matter behind them, and in viewing them, I think it is absolutely critical that everyone understand that these individuals did not participate in what went on here. They didn't benefit from it. Indeed, the shareholders of this corporation have not taken any dividends or distributions in connection with this.

Besides the fact that the individuals who are at the corporation now were not involved in this matter, it was taken, the crime was really committed by an individual who not only is not there any more, but who was acting in complete contravention of the well-established clear policy of the corporation.

In addition, I know your Honor, in sentencing Mr. Carpenter, took into account all the facts and circumstances, including the nature of the offense here. Well, I don't, while I don't mean to excuse the conduct, I think we have all reviewed the facts in such manner and detail as to fairly indicate that we are not dealing with conduct that is as culpable as is involved in a number of other crimes.

I also want to make a very basic point that I think the Court ought to take into consideration, the extraordinary cooperation of the corporation here. I have been involved in law enforcement both as a prosecutor and as a private counsel for, I don't know, ten or eleven years, and I can't remember, at least and I don't think I was ever involved in a situation which an entity or a person took such a principled, responsible position.

In this case, when the company discovered the documents and it indicated a crime has been committed, not only did they produce them to the Government, but they isolated them out and specifically directed the Government's attention to those documents. I think it is fair to say that that act by the company resulted in Mr. Carpenter's determination to cooperate with the Government. Up until that point he had, as I understand it, completely professed his innocence. He certainly had done so to the company.

And I think that not only is important in terms of saying, well, the company cooperated, but it is concrete evidence of the fact that we have responsible, law-abiding people who are in control and who are running this company now, and who in a very difficult situation are trying to save the jobs of a bunch of people and go forward and conduct their business.

In that regard, I would finally say that any fine for this corporation would be a substantial one, under the financial situation and status of this company. A large fine will almost certainly put the company out of business, because given the numbers, given the performance, given the obligations of this company already, it makes absolutely no sense for it to continue if on top of the staggering losses and the incredible deficit, negative net worth that it now has, if a large fine is imposed on top of it, a large fine I might add, I can't see how the corporation could pay.

But those are the points that I wish to emphasize. I thank you for your time, your Honor, and again I reiterate if now we are, after Mr. Levy speaks, you have any questions, I would be happy to respond to you.

THE COURT: Thank you, Mr. Sears. Mr. Levy.

MR. LEVY: Thank you, your Honor.

Your Honor, let me preface my remarks by saying that I think that the Government, as well as the corporation, is very interested in seeing that the Court metes out a sentence which is

fair. I hadn't intended to really address the Court today, but I did receive a sentencing memo from Mr. Sear the other day which raises certain points that I believe need to be addressed. One of those points in the memo is that Harry carpenter acted alone.

Your Honor, the Government's investigation has revealed facts that are directly to the contrary of that position. The Government has evidence that Mr. Carpenter did not act alone, that Mr. Carpenter did act with the, he did act with the senior officers of the corporation; he did act the president; he did act with the vice president in charge of finance in bribing these Nigerian officials or in violating the Foreign Practices Act, which is the count which is charged in the information before the Court.

I can name the individuals form the Court if you would like, but the individuals, the president of the company, the vice president in charge of finance are both named in some — in the documents to which Mr. Sear referred, the interoffice company memoranda that were written by Harry Carpenter, discussed with them, given to them.

So I think it is pretty clear to the Government, your Honor, that Mr. Carpenter was not acting alone. He was acting in conjunction with the senior officers of the corporation. Mr. Carpenter was chairman of the board of directors, acting for the board of directors, so we feel that that contention that has been raised by the defendant that Mr. Carpenter was acting alone is not grounded in fact.

I might also say that there is some evidence from Mr. Carpenter that an official of the corporation which owns W. S. Kirkpatrick was involved intimately with the payment of this — this improper payment to this Nigerian national which is charged in the information. I can also name this individual for the Court. And I might say to the Court that this individual is not a United States national, he is a Syrian national, I believe. We have invited him to appear before the Grand Jury. We have attempted to elicit the cooperation of Mr. Sear in getting

him here, and I think that Mr. Sear has done all he can, but however, this individual has indicated that he is not going to appear without I think a grant of immunity which the Government is not going to give.

The next point that I would like to address, your Honor, is that there were no other instances by W. S. Kirkpatrick, violations of the Foreign Corrupt Practices Act. The Government is also in possession of the fact that there was another violation of that Act, the Foreign Corrupt Corporations Act by the corporation, and this is outside the statute of limitations, so therefore the Government has not elected to proceed on it.

Another point I would like to address is that no competitors of W. S. Kirkpatrick were excluded from bidding on the Nigerian contract. Your Honor, the Government is in possession of evidence which indicates that this is false, because William Mitchell, who is the president of Environmental Techtonics Corporation, a Pennsylvania corporation, was quite interested in bidding on this Nigerian contract. Mr. Carpenter, as well as others at W. S. Kirkpatrick were aware of this, and it appears from the evidence that we have that in fact Mr. Mitchell was excluded from bidding on this contract because of the improper conduct by Mr. Carpenter, the corporation and other senior officers at the corporation.

There was also made mention in Mr. Sears sentencing memorandum of no evidence of payment being actually made to these foreign officials. I should tell the Court, your Honor, that the Government has been for the last three-quarters of a year attempting to obtain the permission of the Government of Luxembourg, in order to penetrate their bank secrecy laws, in order to get the necessary documents from the banks in Luxembourg.

The State Department has been helping with this, and as I understand it, that information may soon be forthcoming in this year. So it is not a question of the evidence not existing, it is

just a matter of following the protocols with the Government of Luxembourg and with the State Department in order for them to give us something which they ordinarily would not do.

The next thing I would like to say about this case, your Honor, is that there has been made mention of the fact that no present employees of the company are accountable for the situation at hand. I would agree with that except for the fact that one of the individuals who is now in a very prominent position is still at the corporation. This individual is current, has been sent the target letter by the Department of Justice advising him that he is a target of a Grand Jury investigation, that the Government is contemplating indictment. And so I would say to the Court that except for this one individual, Mr. Sear's statement is true, there are no employees here who were responsible for, but this individual who directly authorized the payments to this Nigerian note in violation of the Foreign Corrupt Practices Act, your Honor, is still there.

Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated. In reading Mr. Sear's sentencing memorandum, your Honor, I got the impression that Foreign Corrupt Practices Act is somehow not effective or maybe somehow not needed, but I can say that the government of Nigeria as well as the State Department have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain evidence about who possibly received the payments which are set forth in the memoranda that Mr. Carpenter wrote to other senior officers of the corporation.

I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State department has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.

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The Government is interested in, without calling for a specific figure, the Government is interested in a fine that would send a clear signal to the business community, in New Jersey and else where, that the Foreign Corrupt Practices Act is important and that the purposes which led to the enactment of the Foreign Corrupt Practices Act are very valid and to be given weight and that this type of conduct will not be permitted in the business community.

Now, that is all I have, your Honor.

THE COURT: Thank you. Mr. Sear, is there a response?

MR. SEAR: Yes. Certain of the points made by Mr. Levy, I can't really respond to because he is indicating he has received the information that we have never been made privy to and we don't know anything about, and if he has got it, he has got it, and if he doesn't, he doesn't. I don't think those sort of general observations provide the proper basis for determining what fine ought to be given to Kirkpatrick.

Secondly, with respect to the situation in Nigeria, I don't think that again, present political situation, what has happened there, is also a highly relevant fact that ought to be given a lot of weight.

The one thing that concerns me the most is, though, and I do want to respond to, and that is the notion that other individuals at the company, one of whom is still there, acted

along with Mr. Carpenter. I mean, the memorandum that I gave to Mr. Levy back in November, that I have referred to, they show that Mr. Crankle was a recipient. But I know Mr. Carpenter has, both through his lawyers and directly to me, told me that he acted alone. And it is my understanding that is what he has told the Government and I know the Government indicated that Mr. Carpenter had cooperated fully and had been truthful with him.

Indeed, Mr. Levy and his then supervisor and I had a conversation almost a year — well, over a year ago, I guess, in which we discussed the situation with respect to Mr. Crankle, because it was brought up, the fact that he is still with the company and he is indicated as a recipient of this memo. My position then was, look, we are going to act responsibly. We are not going to go out and fire somebody to help us in connection with an investigation. But if we learn of evidence that somebody was involved in a crime, participated in a crime, we will take appropriate action, but to this date, all that we have heard and been told is that he is shown as a recipient on the memo.

It is my understanding Mr. Carpenter has simply said, Mr. Crankle got this memo, that is about it, that is all I can tell you. Again, this is somebody who the Government said to your Honor had been truthful and candid. Now, the point I am — all I am really making here is that the fairly construed, no matter how you say whose name is on the memo or whatever, this was an individual act by one person. I mean, I have enormous sympathy for Mr. Carpenter. The situation that he found himself in, and I think he truly was trying to do good for the company as well as himself but this is not a situation where you have a bunch of people at the company and you have corporate policy, you have a truly corporate act that demands some stern response. It is a situation in which one man committed a crime and because of the theory of vicarious responsibility, the company is responsive.

So I think the Court ought to take that sort of reality in account, and unless you have any questions, I have no further comments at this time.

THE COURT: No, I have no further questions. Mr. Levy.

MR. LEVY: Yes, your Honor

THE COURT: I want to be sure I do hear out both counsel.

MR. LEVY: All right. Mr. Carpenter has made a series of approximately four, perhaps five proffers to the Government in which he completely details his involvement from beginning to end with this Nigerian contract and the improper payments to Ackendelli, and during the course of this, he describes the circumstances that led him to writing these memos.

Well, the reason that he wrote the memos is because he wanted these two individuals that are named on these documents to be completely aware of everything that was happening in the event that he was to leave the corporation, which he was going to do in January of 1983. He fully discussed it with these two individuals. They lived this on a day-to-day basis. That is the reason he wrote it. He was not acting alone. He was acting, I must admit he was acting for the benefit of himself, but he was also acting for the benefit of the corporation because he knew that the corporation needed that contract, that 10.8 million dollars contract.

When I read Mr. Sear's memo that the corporation did not profit, I was absolutely flabbergasted. To give the company a million dollars, for them to conduct their business operations for them to meet — to have the funds necessary to meet their day-to-day survival is an absolute benefit, in the eyes of the Government. And that is why we told the probation officer that any that any fine in terms of the Government's case must be considered substantial when measured against that

approximately 1 million dollars profit. Thank you, your Honor.

THE COURT: I guess one of the more difficult things in this case is the fact that we are dealing with a corporation, and sometimes it is like punching a bag of smoke. You kind of wonder where the real damage is done by the actions against the corporation. Many times, frankly, innocent people can suffer. And I respect that argument that is made by Mr. Sear. I do note that I have a document before me that does indicate that, with respect to the presentence report, that W. S. Kirkpatrick & Company has fully reviewed it and they have made their comments with respect to that report in their presentencing memorandum.

That was executed today, January 6, 1986.

There are a couple of things that I think are worthy of some comment, and as I say, it is not an easy matter to try to establish what should be the real deterrent in this case. But I am somewhat influenced by the fact that the corporation, and it doesn't seem to be much dispute, did take the initiative to whatever degree, in cooperating with the Justice Department once it was known that they were, or that Mr. Carpenter was somewhat involved in violation of this act, and this Foreign Corrupt Practices Act, as indicated in the presentencing memo. Apparently counsel for the corporation went to Washington and actually hand-delivered certain key documents which perhaps would have been found in any event, but made the search a lot easier. There is indication that the corporation has a policy and the policy is one where naturally it would indicate that it doesn't condone any violation of the foreign corrupt Practice Act.

The corporation further indicates that their profit margin before they entered into this situation was set before the total involvement with the corruption in Nigeria. I guess the indication there being that the profit was certain, certainly not expanded but what had to be build into it was this payment in order to facilitate the granting of the contract. All in all, it

doesn't indicate the purest of intention on the part of the corporation. The corporation is in fact involved.

But then it comes to the matter of imposing a fine. The presentencing memorandum itself filled with indications and the letters that I have received from the actual employees of the corporation indicating that there is really no ability of the corporation to pay, that they haven't paid dividends since 1978, I believe it was, that the real victims here would be the lower level employees who would suffer because the corporation would actually respond by making funds available, taking them away from those who perhaps are most innocent, and I think that is the perplexing part of this kind of a sentencing, when you seem to want to move against a small corporation, small in that the victim is more identifiable as being the lower level employee, as against Mr. Carpenter who in order to achieve his bonus could very well have been stimulated into acting personally but we can't say that that action only went to Mr. Carpenter.

Actually, the corporation simply by benefit of obtaining the contract benefited through the profit to some degree. And I can't completely ignore the fact, although it is absolutely no excuse, that corruption is a way of life from the record before me in Nigeria, and I think that is one of the most disturbing facts that I confront, because when you do look at corruption being a way of life, you have to realize that the victims, the ultimate victims of that corruption are the poor souls in Nigeria who certainly are suffering enough, but who become greater victims at the hands of those who corrupt in the name of their government, and yet they are out of the reach of this Court, and I think that is where the real danger lies.

Mr. Levy makes a point that the corporation knew and that seems to be refuted. I think for the purposes of this sentencing, that I don't have to go beyond what was capable of proof in any event, because I think if there are those who knew, who are still there, they should be the real persons to respond for the damage that they have created because they can be subject to punishment as individuals, that there were no

other violations that they occurred outside the statute of limitations.

I have no proof before me to know how to measure that and I didn't consider that in the sentencing, that a competitor suffered. Again, there is no real proof against the corporation after their plea to know how to measure some of the allegations, although they are there, and again, I give no real weight to that factor in the sentencing. That their are efforts to reach the foreign bank accounts, I can appreciate that that is occurring and should occur, but again, I have no way of measuring that fact from our records at this sentencing, and that there are present employees who are targets, perhaps, or being pursued by the Government, people still in existence in the corporation, I think that is perhaps where the investigation should go, and for my purposes this afternoon, that information should not play any part in the sentencing here because I am bound in fairness by the record that is before me.

I have no hesitation in saying those who authorized or participated in should be the real targets of the Government's investigation. We are now left, however, with the corporation. How do you deal in fairness with a corporation that is small and says that the real victims are going to be those who did not participate in it, the lower level employees? The corporation that says it really can't afford to pay, that any substantial fine would drive them out of existence, almost like a death sentence to a corporation.

And being a human being, and you try to measure these things, it is not an easy matter to measure because you do have a certain amount of feeling, and one feeling is that I totally respect the passage of the Foreign Corrupt Practices Act because I think that if the Government is ever going to give a signal as to what fair dealing is, it has to do it, this is one way of doing it and that act must be respected.

So that we indicate that it is a way of life in other nations, it can't be a way of functioning by citizens of this nation, and I think that is the way we started, indicating what the ideals to

which we are dedicated really mean, and that is by living them here, so that even though it is a new act and we don't have a lot of experience as to how to sentence corporations under it, it is an act which nevertheless must be fully recognized and allayed.

The next question is how do you balance that? Whatever signal should be given to the corporations of the United States in saying that that act will be followed, and I think in doing it with some balance and some fairness with those who are actually before the Court now, I think the $10,000 requested by counsel is certainly not sufficient to indicate that this kind of activity will not be condoned. I think the measurement has to be one where the amount has to be substantial as applied to this corporation, where the amount of the fine should certainly not be taken as precedent against any other individual corporation because I hope it is a measurement of what should be the fine to this corporation, taking all of the circumstances before me, by giving full consideration to all the circumstances presently before me.

The fine that this Court feels should be imposed, under the circumstances of this case, is a fine of $75,000 to be payable within an arrangement with the probation office over the period of five years. That is certainly not the $10,000 requested by counsel. It is certainly not a figure that I think is totally punitive to the extent of playing partially against the innocent victims of that corporation, but I hope it is one that because this is a new area of the law and we don't have a lot of precedent to measure, that does sound the signal to say perhaps this is a learning process. Violation of this act will not be condoned and if lessons are not learned, perhaps the fines will have to be stiffer in the future.

Under the circumstances, gentlemen, I think a sentence in this case would be $75,000 payable by W. S. Kirkpatrick & Company over a period of five years. That arrangement to be worked out by the Probation Department. Is there anything further?

MR. LEVY: The Government has nothing further, your Honor.

MR. SEAR: No, your Honor, other than to say it has been a pleasure and a privilege to be before you.

THE COURT: Thank you.

MR. HORN: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	)	Civil Action No. 86-796HJS
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*	)	

PLAINTIFF'S RESPONSE TO SUGGESTION OF SUMMARY JUDGMENT AND PLAINTIFF'S RULE 56(f) AFFIDAVIT

In a conference call of August 20, 1986 between the Court and all counsel, the Court posed ten questions and indicated its intention to consider some or all of the pending Motions to Dismiss as Motions for Summary Judgment. On or about August 27, 1986, counsel for Plaintiff and counsel for W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick"), and DIC (Holding), Inc. ("DIC"), tendered the requested submissions. It is the position of Plaintiff that, at this early juncture, the depositions, Answers to Interrogatories and the Affidavit of Carpenter show that there are genuine issues as to material facts and Movants are, therefore, not entitled to judgment in their favor as a matter of law pursuant to Rule 56, F.R.Civ.P.

Plaintiff's specific responses to Kirkpatrick's Answers to the Court's questions are discussed, in detail, below. In summary, Plaintiff urges that the Court should rule on the pending appeal from Magistrate Hedges' Order concerning Carpenter's Fifth Amendment claim and should allow discovery so that the necessary facts may be ascertained and so that this Court will thereafter be in a position to rule on the pending Motions to Dismiss.

QUESTION 1:

Is there any law in Nigeria concerning bribery and public officials with regard to public contracts?

PLAINTIFF'S REPLY:

Both Plaintiff and Defendants appear to agree that the allegations contained in the Complaint would constitute a violation of one or more Nigerian criminal statutes concerning bribery. This Court is entitled to take judicial notice of this foreign law pursuant to Rule 44.1, F.R.Civ.P.

QUESTION 2:

Did Nigeria compel the payment of the bribe under penalty of loss of the contract?

DEFENDANTS' FACTUAL RESPONSE TO QUESTION 2:

Kirkpatrick's knowledge on this subject is derived from two memoranda, which are attached hereto as Exhibits B and C. These memoranda establish that Mr. Akindele advised Kirkpatrick that the Nigerian government, as a matter of course, required payments as bribes to be made by any company that is awarded a Nigerian government contract. Specifically, the March 30, 1981 memorandum, which is attached as Exhibit B, states that Mr. Akindele's attorney advised Kirkpatrick that such payments are "required and asked for by the customers." Further, the memoranda make clear that Mr. Akindele advised Kirkpatrick that it would not have been awarded the contract unless it paid money to Nigerian officials and/or representatives. For example, according to the March 30, 1981 memorandum, Mr. Akindele, in advising Kirkpatrick to pay a bribe, "reviewed in great detail *the habit of Nigeria and the expectations of many*, and stated that we *must* think in terms of a 20% margin . . . to put the project 'over the top' (emphasis supplied)." (Defendants' Response at pp. 7-8)

PLAINTIFF'S REPLY:

Plaintiff does not accept Kirkpatrick's unsworn suggestion that Nigerian government officials, as a matter of course, required bribe payments for government contract business. Rather, in order to ascertain the true facts, if relevant, Plaintiff desires to take the deposition of Defendant Carpenter, which deposition is currently unavailable due to the Order of Magistrate Hedges sustaining Carpenter's claim of privilege. This ruling is currently before this Court via Plaintiff's Notice of Appeal, which appeal should be ruled upon at this juncture. Further, the depositions of Akindele and other knowledgeable persons may be necessary.

QUESTION 3:

Has Nigeria been informed and, if so, how, when and by whom of the bribery?

DEFENDANTS' RESPONSE TO QUESTION 3:

Kirkpatrick contends that the Republic of Nigeria has been informed of the bribery.

PLAINTIFF'S REPLY:

Plaintiff agrees that the Republic of Nigeria has been informed of the bribery pursuant to the July 31, 1986 letter from Plaintiff's counsel to the Nigerian Ambassador to the United States, a copy of which was previously submitted to the Court as Exhibit "B".

QUESTION 4:

Has Nigeria sought legal redress against its governmental representatives or anybody else receiving the bribes and/or any defendants is this case?

DEFENDANT'S RESPONSE TO QUESTION 4:

Kirkpatrick and DIC contend that neither have been the subject of an attempt at legal redress at the behest of the Republic of Nigeria. Kirkpatrick contends that Carpenter has been advised that legal redress has been threatened against him (Carpenter).

PLAINTIFF'S REPLY:

Plaintiff has no information concerning whether the Republic of Nigeria has sought legal redress against either Kirkpatrick or DIC. The deposition of Carpenter, currently before this Court as an Exhibit to the pending Notice of Appeal, makes clear that Carpenter has no information to the effect that the Republic of Nigeria has sought redress against him but rather Carpenter has some information, hearsay in nature, which is to the effect that the Republic of Nigeria would like to *question* Mr. Carpenter concerning this situation.

QUESTION 5:

Who are the medical group, the party and the minister (as set forth in paragraph 35 of the Amended Complaint)?

DEFENDANTS' FACTUAL RESPONSE TO QUESTION 5:

"The knowledge of the defendants who prepared this submission regarding these names is derived from the memorandum dated March 8, 1982, which is attached as Exhibit C. Regarding those names, the memorandum states:

> During that September visit, Akindele gave me a breakdown of what the overall 20% commission would constitute. It came down to the following:
>
> 2 1/2 - for Akindele
> 5 - for air force
> 2 1/2 - medical group

5 - party
2 1/2 - minister himself
2 1/2 - other key defense personnel

Litigation and resolution of this action, of course, would require inquiry into the identities and actions of the above-listed individuals and entitles. Under the circumstances, since it is the plaintiff who sets forth allegations regarding these individuals and entities in the Amended Complaint, the plaintiff is the party best suited to provide the information the Court seeks." Defendants' Response at pp. 11-12.

PLAINTIFF'S REPLY:

Kirkpatrick and DIC suggest, but do not state either by Affidavit or otherwise, that their sole knowledge concerning this question is derived from the March 8, 1982 memorandum, Exhibit C to their submission. Defendants, as bribe conspirators, without affording Plaintiff any discovery, suggest that Plaintiff is the "party best suited" to supply the requested information.

In order to obtain the pertinent information for submission to this Court, Plaintiff requires discovery. First, Plaintiff must take the deposition of Carpenter and, accordingly, it is therefore necessary that this Court determine the presently pending Appeal. Second, Plaintiff will need to attempt to obtain information from one or more banks concerning banking transactions evidencing payments in the form of bribes to one or more of the individuals identified in the March 8, 1982 Kirkpatrick memorandum. Depending upon the availability of this banking information, Plaintiff may need to depose one or more former Nigerian officials or other persons with respect to this subject. Finally, Plaintiff may need to take the deposition of Defendant Akindele who is one of the people in a position to provide the pertinent information.

QUESTION 6:

Has the contract been completed? Have all obligations been performed under the contract? Have the goods and supplies been delivered? Has the base been constructed?

DEFENDANTS' RESPONSE TO QUESTION 6:

"Kirkpatrick has completed 95% of its obligations pursuant to the contract. It had not completed the remaining 5% of its obligations by the time the criminal investigation commenced. Kirkpatrick did not perform any services on the contract following commencement of the criminal investigation and has no intention of doing so at any time. Kirkpatrick believes that Nautilus Enviromedicals Systems, Inc., one of the subcontractors on the original contract, has arranged with the government of Nigeria to complete the contract and is currently in the process of doing so." (footnote omitted)
Defendants' Response at 12.

PLAINTIFF'S REPLY:

None of the "facts" set forth in the foregoing Response are supported by any Affidavit. Plaintiff desires to take one or more depositions of Kirkpatrick representatives concerning the alleged facts set forth in the Defendants' Response. (For example, why does Kirkpatrick have "no intention" of completing the contract for which it was apparently paid by the Republic of Nigeria?)

QUESTION 7:

Has Nigeria done anything in light of the contract and the allegations in this case and, if so, what and when? Has the Nigerian government challenged in any way the contract or the parties to the contract?

DEFENDANTS' FACTUAL RESPONSE TO QUESTION 7:

Defendants urge that this question is answered by virtue of the fact that no formal legal redress has been sought against either Kirkpatrick or DIC.

PLAINTIFF'S REPLY:

Although Plaintiff has no knowledge concerning this matter, it seems likely that in light of the suggestions contained in Kirkpatrick's Response to Question 6 which are to the effect that Kirkpatrick has not completed the contract, one or more representatives of the Republic of Nigeria have had discussions with one or more Kirkpatrick representatives concerning this subject. In order to obtain the necessary facts for submission to the Court, Plaintiff requires the deposition testimony of one or more Kirkpatrick representatives concerning the information sought by the Court's question.

QUESTION 8:

Are there any internationally accepted standards concerning bribery under situations with regard to this case?

DEFENDANTS' FACTUAL RESPONSE TO QUESTION 8:

Defendants' response to this question is that bribery of government officials is expressly prohibited throughout the world. Defendants also suggest that "pursuit of this action would invariably prove humiliating to the Government of Nigeria since, if plaintiff's allegations are true, it would involve the Nigerian government publicly in actions which are internationally recognized as disgraceful." Kirkpatrick Response at p. 16.

PLAINTIFF'S REPLY:

To the extent that this suggestion constitutes an allegation of fact, it is not supported by any Affidavit and is subject to serious question. To the extent that responding Defendants wish to urge this "fact" upon the Court, some method of proof other than pure argument is required.

QUESTION 9:

Who initiated the concept of the bribe, the defendants or the Nigerians?

DEFENDANT'S FACTUAL RESPONSE TO QUESTION 9:

"Mr. Akindele initiated the concept to Kirkpatrick. Based on Mr. Akindele's statements, Kirkpatrick believes that officials and/or other representatives of the Nigerian government initiated the concept to Mr. Akindele by making it clear to him that they would not consider any bid for the contract unless a commission was distributed to them." Defendants' Response at 17.

PLAINTIFF'S REPLY:

There is no proper and admissible evidence of record to support Defendants' contention that Defendant Akindele initiated the bribe discussions with Kirkpatrick. In order to ascertain the true facts surrounding this situation, it is necessary that Plaintiff take the deposition of Defendant Carpenter and thus it is appropriate for this Court to rule upon Plaintiff's appeal from Magistrate Hedges' Order sustaining Carpenter's claim of privilege. Further, Akindele's deposition may be necessary in order to further explore these same facts.

QUESTION 10:

Is this type of pleading (specifically with regard to the allegations set forth in Paragraph 57 of the Amended Complaint) legally sufficient under the RICO setting?

SUMMARY OF DEFENDANTS' RESPONSE TO QUESTION 10:

Kirkpatrick and DIC argue that the Amended Complaint fails to state a claim upon which relief can be granted by virtue of the absence of proper "pattern" allegations. Defendants present additional legal argument concerning the "pattern" requirement.

PLAINTIFF'S REPLY:

The language of paragraph 7 of Plaintiff's Amended Complaint is not "boilerplate" language and does have a factual basis. Accordingly, neither a Rule 12(b)(6) dismissal nor a Rule 56 summary judgment is appropriate.

First, Prosecutor Levy, at the sentencing of Kirkpatrick, stated in open Court to sentencing Judge Rodriquez, that Kirkpatrick engaged in "another violation of the Act, the Foreign Corrupt [Practices] Act...." (Kirkpatrick Sentencing Transcript, Exhibit "E" to Defendant's Response, at p. 7.)

Secondly, the March 8, 1982 Kirkpatrick inter-office memorandum, Exhibit "C" to the Defendant's Response, at p. 2, suggests that Kirkpatrick had previously engaged in bribery in order to obtain sales contracts. In order to understand the basis for this contention, a very brief review of certain pertinent facts is necessary. It appears from the facts developed in the criminal proceeding and from the facts set forth in the two Kirkpatrick memoranda that Kirkpatrick's primary bribe activities in connection with the instant contract were conducted through Defendant Akindele. However, the text of these memoranda also suggest that Akindele's bribe connections may have stopped short of the very highest levels

of the government of the Republic of Nigeria. Apparently Kirkpatrick believed that in order to finally complete the contract and payment arrangements with the Republic of Nigeria, the intercession of yet another bribe intermediary may have been necessary. The individual who was to be involved in the highest level of bribery was Alhaji Ringim. Apparently Carpenter felt that Kirkpatrick might be required to pay even more bribes than it had agreed to (20%) and was therefore very interested in coordinating the efforts of the two agents being used to pay bribes on behalf of Kirkpatrick, Akindele and Ringim.

Thus, in the March 8, 1982 memorandum, in purporting to recite a conversation between Carpenter and Akindele, Carpenter states:

> " I [Carpenter] explained [to Akindele] our [Kirkpatrick's] long association with Alhaji Ringim and the fact that he was a member of the Hausa party, and that it might very well be necessary for him [Ringim] to be involved in this program in order to make sure it got through." (March 8, 1982 Memorandum at p. 2.)

A fair reading of this memorandum suggests that Ringim and Kirkpatrick were involved in prior bribery escapades. The details of these prior escapades — *i.e.*, the "long association"— are currently unknown to Plaintiff.

Plaintiff requires the Carpenter deposition in order to fully explore these facts. Additional discovery will also be necessary. However, at this juncture, it is clear that Kirkpatrick has not shown through undisputed facts that it is entitled to judgment as a matter of law in its favor based upon the absence of a "pattern" of racketeering activity.

CONCLUSION:

This Court's suggestion that it would prefer to entertain the presently pending Motions to Dismiss on the basis of Rule 56 was an excellent suggestion. However, because of the early

stage of this case, there are not undisputed facts of record which would permit the entry of summary judgment in favor of either Plaintiff or Defendants.

Plaintiff's right to engage in additional discovery pertinent to the pending Motions is severely circumscribed by virtue of two court Orders. The earlier of these Orders is dated May 30, 1986 and provides, at paragraph 4, that "Defendants shall not be required to provide any further discovery pending disposition of the previously filed Motions to Dismiss."[1] (A copy of this Order is submitted herewith for the convenience of the Court.) This Order was not received by Plaintiff's counsel until after the ten day period for appeal therefrom had already expired and, accordingly, no appeal from this Order was initially pursued.

Plaintiff will soon file a Motion to extend the time for appealing Magistrate Hedges' May 30, 1986 Order to the extent that such Order stayed discovery and appeal that Order to this Court.

The second Order which effectively precludes necessary discovery is the July 17, 1986 Order of Magistrate Hedges which sustains Carpenter's assertion of a Fifth Amendment privilege. This Order is the subject of a pending Notice of Appeal which is currently before this Court.

Plaintiff believes, based upon the statements of Assistant United States Attorney Levy at the Kirkpatrick sentencing proceeding, that additional evidence pertinent to this civil action is in existence but is unavailable due to the secrecy provisions surrounding federal grand jury investigations (Rule 6(e), F.R.Civ.P.). Accordingly, within the very near future, Plaintiff will file an appropriate Motion seeking disclosure of the pertinent grand jury materials, which materials will be

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1 At paragraphs 2 and 3 of that same Order, the Magistrate also circumscribed Plaintiff's right to discovery from Carpenter (¶2) and Kirkpatrick and DIC (¶3).

submitted to the Court in connection with the pending Motions, if appropriate.

Finally, pursuant to Rule 56(f), Federal Rules of Civil Procedure, Plaintiff's counsel, by his Affidavit appended hereto and submitted contemporaneously herewith, hereby certifies that the factual allegations concerning the absence of necessary discovery information contained in the present Response explain why Plaintiff is unable to provide additional factual materials, in the form of Affidavits or otherwise, to the Court at this early juncture so as to permit a proper Rule 56 summary judgement disposition.

Respectfully submitted,
RUTTER, TURNER & STEIN

By _____
Thomas B. Rutter
872 Public Ledger Building
Independence Square
Philadelphia, PA 19106
(215) 925-9200

By _____
Alan Turner
209 Haddon Avenue
Haddonfield, NJ 08033
(609) 429-6022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	)	Civil Action No. 86-796HJS
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*	)	

RULE 56 AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA:
SS
COUNTY OF PHILADELPHIA :

ALAN A. TURNER, ESQUIRE, being duly sworn, does hereby depose and state as follows:

1. I am one of the attorneys representing Plaintiff Environmental Tectonics Corporation, International, in this civil action.

2. The facts set forth in the foregoing Response of Plaintiff's Response To Suggestion Of Summary Judgment and Plaintiff's Rule 56(f) Affidavit concerning the present unavailability of discovery information are true and correct to the best of my knowledge, information and belief.

3. Because of the present unavailability of factual information which may be necessary to this Court's disposition of a Rule 56 Motion for Summary Judgment, this Court is requested to refuse the Application for Summary Judgment or, alternatively, is requested to order a continuance of this pending Motion for Summary Judgment so as to permit the necessary discovery to be accomplished and submitted to the Court.

The foregoing facts are true and correct to the best of my knowledge, information and belief.

_____
ALAN A. TURNER

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 9TH DAY OF
SEPT. A.D., 1986.

_____
Notary Public

MY COMMISSION EXPIRES:

SPENGLER CARLSON GUBAR BRODSKY
& FRISCHLING
Attorneys for Defendants
W.S. Kirkpatrick & Co., Inc.
Development Industrial Corporation
and DIC (Holding) Inc.
280 Park Avenue
New York, New York 10017
(212) 286-4000

ENVIRONMENTAL TECTONICS CORPORATION INTERNATIONAL	:	IN THE UNITED
	:	STATES
-against-	:	DISTRICT
	:	COURT FOR
W.S. KIRKPATRICK INC., DEVELOPMENT INTERNATIONAL CORPORATION, DIC (HOLDING) INC., IDC INTERNATIONAL S.A. LUXEMBOURG HARRY G. CARPENTER and BENSON "TUNDE" AKINDELE	:	THE DISTRICT OF NEW JERSEY
	:	
	:	Civil Action No. 86-796HJS

ORDER

And now this 30th day of May, 1986, a status conference having been held on May 27, 1986 before the Honorable Ronald J. Hedges in the presence of Thomas H. Sear, Rhonda D. Orin, Lawrence S. Horn, Kelley Newton and Alan Turner, it is hereby ordered that:

1. Thomas H. Sear and Rhonda D. Orin are admitted *pro hac vice* in this case and appropriate affidavits shall be filed forthwith.

2. Defendant Harry G. Carpenter shall be deposed within 14 days of May 27, 1986. Said deposition shall be limited to

questions concerning documents prepared or maintained by defendant W.S. Kirkpatrick & Co., Inc. (erroneously named in the Complaint as "W.S. Kirkpatrick, Inc." and referred to hereinafter as "Kirkpatrick"), and questions asked in the first two sets of interrogatories directed to Kirkpatrick, and the first set of interrogatories directed to Mr. Carpenter. Said deposition shall be conducted in Mr. Carpenter's attorneys' offices in Roseland, New Jersey.

3. Of the outstanding discovery requests directed to Defendants W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick") Development Industrial Corporation (erroneously named in the Complaint as "Development International Corporation" and referred to hereinafter as "DIC") and D.I.C. (Holding) Inc. ("Holding"), Kirkpatrick, DIC and Holding shall only answer those questions in the first set of interrogatories directed to them regarding the corporate relationship among Kirkpatrick, DIC and Holding.

4. Defendants shall not be required to provide any further discovery pending disposition of the previously filed Motions To Dismiss.

5. The time within which Plaintiff Environmental Tectonics Corporation, International may either file its Amended Complaint adding or deleting parties and purporting to meet the defects alleged in the Motions to Dismiss, or, alternatively, file its Responses to the pending Motions to Dismiss filed by such Defendants, is hereby extended from May 26, 1986 to and including June 13, 1986.

6. The next status conference in the above-captioned action will be held at 9 o'clock on July 18, 1986.

_____

HEDGES, U.S. MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	)	Civil Action No. 86-796HJS
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*	)	

CERTIFICATE OF SERVICE

ALAN TURNER, ESQUIRE, hereby certifies that a copy of the within Plaintiff's Response To Suggestion Of Summary Judgment And Plaintiff's Rule 56(f) Affidavit were served upon the following persons by placing a copy of same in the United States Mail, postage prepaid, on Tuesday, September 9, 1986:

Thomas H. Sear, Esquire
Spengler, Carlson, Gubar, Brodsky & Frischling
280 Park Avenue
New York, New York 10017

Lawrence S. Horn, Esquire
Sills-Beck
33 Washington Street
Newark, New Jersey 07102-3197

Theodore V. Wells, Jr., Esquire
Lowenstein-Sandler
65 Livingston Avenue
Roseland, New Jersey 07068

RUTTER, TURNER & STEIN

By_____
Alan Turner

SPENGLER CARLSON GUBAR BRODSKY
& FRISCHLING
ATTORNEYS AT LAW
280 PARK AVENUE, NEW YORK, N.Y. 10017

September 12, 1986

The Honorable Alfred J. Lechner, Jr.
United States District Court
for the District of New Jersey
U.S. Courthouse & Post Office Building
Newark, New Jersey 07102

Re: Environmental Tectonics Corporation v.
W.S. Kirkpatrick & Co., Inc., et al.
Civil Action No. 86-796HJS

Dear Judge Lechner:

We have just received "Plaintiff's Response to Suggestion of Summary Judgment and Plaintiff's Rule 56(f) Affidavit" which apparently is intended to supplement plaintiff's earlier responses to the questions posed in counsel's telephone conference with Your Honor of August 20, 1986 and to reply to the responses of defendants W.S. Kirkpatrick & Co., Inc. and DIC (Holding), Inc.

Although I was strongly tempted to file with Your Honor a reply that dealt with each of plaintiff's arguments point by point, upon consideration my judgment was that our position is clearly set forth in our motion papers and our earlier responses to the Court's inquiries and that no such reply was necessary or appropriate.

Nonetheless, two fundamental points deserve emphasis, particularly because of the claim now raised by plaintiff that a supposed need for additional discovery requires a denial or deferral of the pending motions to dismiss.

First of all, Your Honor made it explicitly clear that the questions you were posing in the conference were focused on the Act of State basis for the motions (See page 3 of the transcript of the August 20, 1986 proceeding). Thus, it is our understanding that the treatment of the motions to dismiss as motions for summary judgment, occasioned by the request for a few specific factual submissions, was limited to that issue. Accordingly, plaintiff's claim that it needs additional, broad discovery before a motion for summary judgment can be properly considered misses the mark since even plaintiff does not claim that additional discovery is necessary on the Act of State issue. In fact, given the responses of the parties to the Court's inquiries and the agreed-upon facts relating to the Act of State issue there is no need for any discovery to properly resolve that issue and that aspect to the motions to dismiss. Indeed, it is our position that the taking of discovery by plaintiff as alluded to in plaintiff's most recent filing, which would include deposing "one or more former Nigerian officials" and which would necessarily involve inquiring into the actions of the Nigerian government would by itself conflict with and violate the letter and spirit of the Act of State doctrine.

Secondly, after plaintiff has been provided with and taken advantage of the opportunity to amend its complaint, has had extensive discovery and examined over 50,000 documents produced by the defendants, and has filed numerous and sundry documents relating to the pending motions to dismiss, it still has failed to allege any facts which, if true, would establish that any defendant had been involved in a "pattern" of unlawful acts so as to be liable for a RICO violation. Instead of alleging such facts, plaintiff suggests that it is entitled to still additional discovery and that it will seek disclosure of certain grand jury materials. Plaintiff suggests that it may thereby obtain some facts to provide a factual basis for the suggestion that Kirkpatrick had previously engaged in some form of unspecified bribery involving some unspecified contract and some unspecified foreign country at some unspecified time.

Plaintiff's position that it has no obligation to set forth a factual basis for its claims now has no support under any

construction of the Federal Rules of Civil Procedure or any case interpreting the rules and counsel for plaintiff does not even purport to suggest any authority.

As discussed in our earlier response, since the *Sedima* decision, district courts throughout the country have not hesitated to dismiss racketeering claims because of a lack of a well-pleaded factual basis for the allegation that a defendant had engaged in a "pattern" of racketeering and there is no reason why this Court should hesitate to dismiss the RICO claims here for the same reason.

For all the reasons set forth in our earlier submissions in support of the motions to dismiss, defendants W.S. Kirkpatrick & Co., Inc. and DIC (Holding), Inc. urge that they be granted in all respects.

Respectfully submitted,

/s/ Thomas H. Sear

Thomas H. Sear

THS:jhp

cc: Alan Turner, Esq.
Theodore Wells, Esq.

THE COURT: What I'm saying is that for the plaintiff to prove its case, it seems to me, and I'm not as familiar with this case, I've just come on duty in July, but it seems to me there are going to have to be some proof to demonstrate that not only did Carpenter or others intend to have the bribe paid, but, in fact, when he made the payments to those Panamanian bearer corporations. That it was not only his intent that that in turn be paid, paid as bribes, but that in point of fact bribes were paid and as a result of the payment or those bribes, the Government officials made a decision, a conscious decision to award the contract to Kirkpatrick International. So it seems to me that not de jure but de facto we're may be inquiring as to the motivation of the Nigerian Government and why they issued the contract as they did, what they did, how they did it, who is involved, what was paid by whom to whom, et cetera, et cetera.

If you want to wait, I'll get a copy of that transcript where Mr. Levy mentions to Judge Rodriguez that the State Department has not issued a release order and that Mr. Levy has been opposing efforts by the Nigerian Government to gain certain information. I don't have this information and that's about all I know.

Mr. Levy, I think you can pick up on that.

MR. LEVY: Okay. Well, it is indeed true that I took the position at sentencing that the State Department was disinclined to have me release certain names contained in those three incriminatory memos.

Now, I think since the prosecution of the American Citizens and American corporations has technically ended, the only outstanding investigation we have is Occapelli. From the Department of Justice's position it's not a problem for us to release now the information to the government of Nigeria.

THE COURT: That's not my point. Under the act of state doctrine, the courts in general are supposed to steer clear of

conduct which could not only cause embarrassment, but also trouble for the executive through the department of state in conducting foreign affairs. Now, I don't know how high these officials are. There was some reference by you to the president of the Republic of Nigeria was under house arrest. I don't know if that applies to this case or not and I'm not asking for a response.

I'm giving you examples. My point is if we go ahead and develop this information, aside from how the plaintiff is going to develop it, if it does come out, is it going to be a problem for the executive and his conduct of foreign affairs through the Department of State or is it a moot point now? If it's a moot point, I can move on with litigation. If it's not, I have to consider it in light of the act of state inquiry.

MR. PAEY: Fair enough. Let me interpose an observation. Number one, as I take your point, you do consider the disclosure of specific names of alleged Nigerian recipients of bribes to be a relevant and an intergral part of the facts that you have to adjudicate.

THE COURT: At this point I don't say that on the merits, but at this point from what I know about the case, it seems that may be necessary. I could be may on that.

MR. PAEY: Yes.

THE COURT: You're the legal adviser of the Department of State?

MR. PAEY: Deputy assistant legal adviser. And, therefore, you will obviously be in a position to where, assuming that we do — may have some problems with disclosure of names, which we have not yet made a final determination on, and my colleague, Bill Bartlett from the Nigerian desk can confirm this, then you will be in a position than perhaps if we do decide we have a problem with one or more of those names, balancing our foreign policy interest

against whatever you consider the legitimate litigation interest of the litigants to be.

THE COURT: That's what I'm calling on. I'm calling appropos of the act of state Doctrine. I'm also calling to give you an invitation, if you like, to put your two cents, as it were, in this case. If you would like to see the briefs that were filed pro and con on the act of state application in this case, I'll give you that opportunity.

I want to give you notification as to what this is all about. If there is no issue, I don't want to build one here. If there is an issue, I think in light of what Mr. Levy said to Judge Rodriguez, I would be remiss in just ignoring it. That's my only intent here, not to steer you in one direction or another, but merely to give you notification and ask for your input. If you decline, I move from there. I'm not directing anything.

MR. PAEY: We appreciate that. I would like to ask Bill Bartlett if he wishes to address any points.

MR. BARTLETT: I think that we would like to look at the information that the Justice has and confirm exactly what the names are. We haven't made any decision up to this point.

THE COURT: Mr. Bartlett and Mr. Paey, I'm not concerned with just the parochial disclosure of the names. I'm concerned with whether the prosecution of this litigation, with what it may disclose or with what it may decide, would in any way involve the act of state doctrine, in any way violate the separation of the powers between judiciary and the executive in the executives discharge of foreign affairs and the conduct of foreign affairs. It's not just as parochial as disclosure of names, but as I say, it seems, and I understand score the word seems, to me at this point with the little I know about this case, that it may be necessary for the plaintiff to prove not only to whom the bribes were paid, if, in fact, bribes were paid and I don't know that, but also the motivation for the conduct or the thinking or the decision process of the Republic of Nigeria or its officials in awarding this contract. Also I am interested in

knowing whether you regard this as having any impact of the conduct of foreign affairs, the United States.

MR. PAEY: I can tell you that our strategy, our position in coming to this particular conference call, your Honor, has been to get a clarification of what is at stake, how important you feel disclosure is, how relevant you think it is, which you have, in fact, done so that we can be in a position to consult not only with our ambassador and his staff and our embassy in Legos, Nigeria of what the litigation and disclosure of these names also with any other key personnel here in the Department of State, with the bureau.

So we would like, in effect, to be allowed a reasonable amount of time to be able to consult with the necessary other officers of the Department of State and to the implications of these issues and for that purpose we would probably find it — I'm sure we would find it very relevant to obtain copies of whatever pleadings have been filed to date on the act of state doctrine, which would clarify our thinking with regard to what it is they intend to do and go after, because I can see very easily the possibility of depositions of Nigerian officials, being issued letters. Complications like that which may in some respect — it's too early to say, effect our relations with the government of Nigeria at this particular time.

Bill, do you have — Mr. Bartlett, do you have any further thoughts along this line?

MR. BARTLETT: Yeah. I agree completely. The earlier conversations with the Justice on this issue, the amount of information that we have received is somewhat limited by the fact a lot of it was still before the Grand Jury. We would — I'm not entirely clear yet. I haven't seen the memos that are involved, if there are memos, and we would want to look at those and get a better understanding of where this might lead.

THE COURT: I want you all to understand that by this phone call I'm not hinting to you or suggesting to you or

implying to you in any way as to how I'm going to rule on this Active State application.

I'm really giving notification and any of my comments here are not to be meant as rulings, or hints of rulings, in any substantive point in the case. I'm merely giving you possibilities - raising questions only.

MR. PAEY: I guess what we would like to do is now that we have a clear understanding of what's involved, is to have a reasonable time to look at this and come up with a position to answer your questions.

THE COURT: I have no problem with that. That's why I called, to give you an opportunity to have input. I don't want it to drag on indefinitely. What you have to understand here, these motions were filed in May. I came on duty July 15. Case was reassigned to me a week thereafter.

I started reading all this material, communicated with the parties involved about two weeks ago via telephone conference call much like we're having now. I alerted them to some of my considerations. They've sent to me responses to my considerations, to my inquiries, my concerns and at this point I think we're going to receive another series of submissions from the parties involved.

I will give you time to look at it if you like. If you would like to send somebody here to go through the pleadings, I'll be happy to do that. I just don't want it to drag too long.

MR. BARTLETT: Your Honor, in terms of logistics, is there anyway we could get by mail a copy of the pleadings? I realize we're third parties to this and not on service distribution.

THE COURT: I'll have them photocopied. Give me the name and address, room number to whom I should forward these.

MR. PAEY: Forward them to me, Michael Paey, P-A-E-Y, Office of the Legal Adviser, room 5419A, U.S. Department of State, Washington, D.C., 20520.

THE COURT: All right.

MR. PAEY: Perhaps I should give you my number in case there is any delay or something you can reach me. I'm at 202, area code, 647-7324 in case something comes up.

THE COURT: All right.

MR. PAEY: We will very expeditiously review these and we will probably today prepare a cable to our embassy in Legos to at least apprise them of the substance of this conversation and let them know we are awaiting receipt of the pleadings and we may have to consult with them further after we've had a chance to review the pleadings. Then the question becomes in what form and manner we would get back to you, if we did have a view.

THE COURT: Well, I would appreciate knowing if the Department of State says they have no problem with litigation, act of state is not a point in contention any longer. I'd like to know that. If it's not going to bother the conduct of the foreign policy, I'd like to know that. If there is going to be a problem, I'm not sure it's necessary that it be detailed. By definition, detailing it may blunt the objective of the Active State Doctrine. I'd like to know the position. If there is no position, fine. The purpose here is to give you an opportunity to reply.

MR. PAEY: All right. We appreciate that. I don't know that I have any further observations to make at this time.

THE COURT: About four or five minutes into this conversation, the court reporter came in and what we've said has been taken down stenographically. I'm going to send this to the other parties in the case. Any problem with that?

MR. BARTLETT: I don't have any problem.

MR. PAEY: I don't believe I have any problem.

THE COURT: They should be aware of it. We haven't discussed anything in detail here to violate the act of state considerations, but they should be aware of the conversation and the questions I raised. This is a motion for summary judgment, your responses are something I'll be taking into consideration. I stress my comments are hypothetical questions - and are not to be considered anything more than that. This conversation was merely to alert you to some of the facts and inquiries only.

MR. PAEY: How quickly would this court reporter be able to transcribe what we said so we can get a copy?

THE COURT: By tomorrow morning.

MR. PAEY: If we could receive that along with the package of the pleadings?

THE COURT: We'll do that.

MR. APEY: All right.

MR. BARTLETT: I don't have any objection as long as it's clearly understood we haven't taken any position on this.

THE COURT: That's my understanding and I think you've said that now. You're clear.

MR. BARTLETT: Judge Lechner, thank you very much for your consideration and we will try to be as cooperative as we can and expeditiously as we can and we will be back in touch, probably. We have to reach you again, probably submit anything that we have to submit via

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United States Department of State

The Legal Adviser
Washington, D.C. 20520

December 10, 1986

The Honorable
Alfred J. Lechner, Jr.
United States District Court Judge
District of New Jersey
U.S. Post Office and Courthouse
Newark, N.J. 07101

RE: *Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co. Inc., et al.*, Civil Action No. 86-796

Dear Judge Lechner:

I am writing on behalf of the Department of State in reply to the Court's invitation to the Department to express its views of the above-referenced civil action in light of defendant's motion to dismiss on the basis of the act of state doctrine. This court has indicated in particular that it might become necessary to examine the motivation of officials of the Republic of Nigeria in taking certain public actions. The Department appreciates the Court's consideration in offering this opportunity for comment.

In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:

> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions...
>
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added).

See United States Government briefs *amicus curiae* in support of petitions for a writ of *certiorari* in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); and in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977), excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 965 and 969, respectively.

These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the

Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

Moreover, the Department is of the view that the act of state doctrine may not apply to the award of the contract in question, to the extent that such award does not constitute a sufficiently formal expression of Nigeria's public policy or interests. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976); *compare Sage Int'l., Ltd v. Cadillac Gage Co.*, 534 F. Supp. 896, 908 (E.D. Mich. 1981) *with General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979).

Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

I hope this letter will be helpful in your disposition of the above-referenced action.

Sincerely,

Abraham D. Sofaer

cc: Alan A. Turner, Esq.
Thomas H. Sear, Esq.
Lawrence S. Horn, Esq.
Theodore V. Well, Esq.

SPENGLER CARLSON GUBAR BRODSKY
& FRISCHLING
ATTORNEYS AT LAW
280 PARK AVENUE, NEW YORK, N.Y. 10017

December 22, 1986

The Honorable Alfred J. Lechner
District Court Judge
District of New Jersey
United States Post Office
and Court House
Newark, New Jersey 07102

Re: Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co., Inc., et al.
Civil Action No.: 86-796 AJL

Dear Judge Lechner:

This letter is in response to the recent letter sent from Abraham D. Sofaer, Legal Adviser to the Department of State to this Court. Based on certain factual assumptions and its legal analysis of the act of state doctrine, the State Department through Judge Sofaer indicates that is "does not believe the act of state doctrine would bar the Court from adjudicating this dispute."

We respectfully suggest that the conclusion set forth in the State Department's letter is based on a misunderstanding of the factual issues in this action and of the act of state doctrine. Upon a proper consideration of this action and the doctrine, the State Department's letter mandates dismissal of this action since, as effectively noted in the letter, adjudication of it "may seriously affect United States foreign relations."

First, the State Department does not appear to understand the factual issues directly presented by this action because it states in the first full paragraph on page two, "As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question." Primarily on this basis, the State Department concludes that the act of state doctrine does not apply. However, the State Department's analysis is incomplete because it fails to acknowledge that this action calls into question whether the award of the contract to defendant W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick") was illegal. When legality is in question, the act of state doctrine does apply because legality is a concern comparable to validity.

As we set forth in the Submission of Kirkpatrick and defendant D.I.C. (Holding) Inc. ("DIC Holding"), dated August 29, 1986, there is no doubt but that legality of the actions of the Nigerian government is at issue in this action. As stated therein, it is illegal in Nigeria, as in most countries, for government officials to accept bribes in return for the award of public contracts. Adjudication of this action will inevitably require inquiry into whether Nigerian officials awarded the contract to Kirkpatrick on the basis of bribes. Thus, it is clear that the legality of the Nigerian Government's award of the contract to Kirkpatrick is at issue.

Further, the State Department letter itself makes clear that legality is a concern comparable to validity and that when the legality of a foreign government's actions is at issue, adjudication is proscribed. As stated in the quotation on page one of the letter, the act of state doctrine "precludes judicial questioning of the validity or legality of foreign government actions . . . [emphasis original]." Indeed, in language immediately preceding the quotation, the United States expressly stated:

> [T]he act of state doctrine rests upon the need to avoid the particular embarrassment, and the specific interference with the conduct of foreign affairs, that may be presumed to result from a judicial determination that a

> foreign sovereign's act was illegal under either domestic law or the legal standards of the international community. United States Government brief *amicus curiae* in support of a petition for a writ of certiorari in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 969.

Thus, even if the legal opinion that the act of state doctrine does not apply to a judicial inquiry into the motivations of a foreign government's actions were correct, judicial resolution of this action would be barred by the act of state doctrine.

Second, the letter reveals a fundamental misunderstanding on the part of the State Department of the act of state doctrine. Specifically, the State Department concludes in the last paragraph on page two that concerns about the effect of adjudication on foreign relations exist "apart from the act of state question." In fact, such concerns go to the heart of the act of state doctrine. As stated by the Supreme Court: "The act of state doctrine is grounded in judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68 (1972). Indeed, the doctrine is designed to avoid exactly the situation which the State Department effectively proposes: one where adjudication of an action by the judiciary would be constrained by concerns about intruding upon the executive branch.

Third, in the letter, Judge Sofaer offers what effectively is a judicial opinion regarding the proper application of the Act of State doctrine. We certainly acknowledge that this Court might be interested in the legal opinions of the State Department on that issue but we would suggest that such opinions are certainly not binding on this Court. Thus, it remains the responsibility of this Court to determine itself the scope and substance of the doctrine and apply it to the factual issues presented here.

Of greatest consequence to this Court is the State Department's view as to whether adjudication of this action might affect foreign relations. In that regard, a fair reading of the letter indicates that the State Department believes that adjudication of the action and the discovery and other related procedures involved in such adjudication might very well seriously affect foreign relations. As the letter states in the last paragraph on page two, actions such as this one "may seriously affect United States foreign relations" and that, should this Court adjudicate the action, "caution and due regard for foreign government sensibilities" would be required throughout the proceedings. These statements make clear that, regardless of other inconsistent, confusing and largely theoretical statements in the letter, adjudication of this action poses in a practical concern to the State Department.

It certainly is clear that the letter fails to offer the express affirmative authorization necessary to justify adjudication. In the letter, the State Department does not find that adjudication will not interfere with United States foreign affairs and that the State Department therefore has no concern about adjudication. Since the State Department has failed to so conclude, this Court lacks the necessary authority to adjudicate this action.

It is well established that express affirmative authorization from the Executive Branch is required for the judiciary to adjudicate actions which call into question the validity or legality of acts of foreign governments. Where the Executive Branch's position as to the lack of a detrimental effect on foreign relations falls short of an unequivocal statement, the doctrine continues to proscribe adjudication. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Here, despite the legal opinions offered by the State Department, there is not such unequivocal statement.

Further, it cannot be argued that the State Department's position here is analogous to the State Department's position in *First National City Bank*, 406 U.S. at 764. In that case, the State Department recognized that the action fell under the act of

state doctrine but stated that from a foreign relations perspective, there was no need for the action to be barred. *Id.* at 764-67. Here, the State Department states that the act of state doctrine may not apply to this action, but that adjudication may seriously affect foreign relations.

Particularly because we believe the State Department's views to rest on an erroneous understanding of the factual issues presented in this action and for all of the other reasons we have discussed, we respectfully submit that continued prosecution of this action would conflict with and is proscribed by the act of state doctrine. Thus, the pending motion to dismiss should be granted.

Respectfully submitted,

Thomas H. Sear

THS:js
Enclosure
(0312j)

cc: Theodore V. Wells, Esq.
Lawrence S. Horn, Esq.
John J. Barry, Esq.
Dominic Amorosa, Esq.
Robert Delventhal, Esq.

Alan Turner (via Telecopier)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL,	)	CIVIL ACTION NO. 86-796
Plaintiff	)	JUDGMENT
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*,	)	
Defendant	)	

This matter having been opened to the court on the motion of defendants W.S. Kirkpatrick & Co., Inc, Development International Corporation, DIC (Holding) Inc., W.S. Kirkpatrick & Co. International, Harry G. Carpenter, John M. Krankel and R.H. Edwards to dismiss and for summary judgment, and the court having read and considered the papers submitted in support of and in opposition to the motion, and having heard the oral argument of counsel, and for the reasons set forth in the Court's Opinion dated April 24, 1987 and filed on May 1, 1987, and for good cause shown,

IT IS, on this 1st day of May, 1987,

ORDERED AND ADJUDGED that Counts One, Two, Three, Four and Seven of the Complaint are dismissed with prejudice; and it is further

ORDERED AND ADJUDGED that Counts Five and Six of the Complaint are dismissed without prejudice.

ALFRED J. LECHNER, JR., U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL,	)	CIVIL ACTION NO. 86-796 (AJL)
Plaintiff	)	OPINION
v.	)	
W.S. KIRKPATRICK & CO., INC., et al.,	)	
Defendants	)	

Appearances: Thomas B. Rutter, Esq. and
Alan Turner, Esq.
Rutter, Turner & Stein
209 Haddon Avenue
Haddonfield, New Jersey 08033
(Attorneys for Plaintiff)

Thomas H. Sear, Esq. and
Rhonda D. Orin, Esq.
Spengler, Carlson, Gubar, Brodsky & Frischling
280 Park Avenue
New York, New York 10017
-and-
Lawrence S. Horn, Esq.
Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein
33 Washington Street
Newark, New Jersey 07102-3197
(Attorneys for Defendant Kirkpatrick and DIC Holding)

Robert L. Krakower, Esq.
Lowenstein, Sandler, Kohl, Fisher & Boylan
65 Livingston Avenue
Roseland, New Jersey 07068
(Attorneys for Defendant Harry Carpenter)

Robert W. Delventhal, Esq.
Crummy, DelDeo, Dolan, Griffinger & Vecchione
One Gateway Center
Newark, New Jersey 07102
(Attorneys for Defendants Emro and Ruppert)

Jerome L. Merin, Assistant U.S. Attorney
Office of the United States Attorney
970 Broad Street
Newark, New Jersey 07102
(Attorney for Department of Justice)

Dominic F. Amorosa, Esq.
86 Stewart Road
Short Hills, New Jersey 07078
(Attorney for Defendant John M. Krankel)

John J. Barry, Esq.
Clapp & Eisenberg
80 Park Place
Newark, New Jersey 07102
(Attorney for Defendant R.H. Edwards)

Lechner, District Judge

This action was brought by Environmental Tectonics Corporation, International ("ETC") against W.S. Kirkpatrick, Inc. and certain other corporations and individuals. ETC seeks damages in connection with the award of a contract which contract ETC alleges was procured in violation of antitrust and racketeering laws. Defendants have moved to dismiss the complaint for failure to state a claim upon which relief may be

granted. ETC has filed an amended complaint more specifically alleging certain aspects of the original complaint while adding and dropping certain defendants.

The motions were filed by defendants pursuant to Federal Rule of Civil Procedure 12(b)(6). With the exception of the act of state portion of these motions, it is assumed for the sole purpose of the disposition of these motions the facts alleged in the amended complaint are true and all reasonable inferences have been drawn in favor of ETC. *See D.P. Enterprises, Inc. v. Bucks County Community College*, 725 F. 2d 943, 944 (3d Cir. 1984). Accordingly, the description of the facts concerning these motions is based in large part upon ETC's allegations. With regard to the act of state argument, additional information has been requested from counsel and, as well, from the United States Department of State[1] which information has been considered together with the exhibits attached to ETC's brief in opposition. Therefore, this aspect of the defendants' motions will be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; all parties have been so informed and have been given an opportunity to respond. This opinion also addresses plaintiff's appeal of three orders entered by Magistrate Hedges.

I. *Procedural History*

ETC filed a three count complaint naming the following defendants: W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick") (erroneously named as W.S. Kirkpatrick, Inc.); Development

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1 The Department of State was notified by telephone of this matter on September 10, 1986 (a copy of the transcript of the telephone call was made available to all parties). In addition, a copy of all relevant documents was forwarded to the Department of State on September 12, 1986. Because of numerous internal problems, the Department of State repeatedly requested extensions of the time within which to respond to the issues presented by the act of state portion of the motions. On December 10, 1986 a response of the same date was received from the Department of State.

International Corporation ("DIC"); DIC (Holding) Inc. ("Holding"); IDC International S.A. Luxembourg; Harry G. Carpenter ("Carpenter"); and Benson "Tunde" Akindele ("Akindele"). The complaint alleged that defendants' tactics in obtaining a contract with the government of Nigeria violated sections of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1962, *et seq.*), the New Jersey Anti-Racketeering Act (§ 2C:41-2, *et seq.*) and the Robinson-Patman Act (15 U.S.C. § 13(c) *et seq.*).

ETC filed an amended complaint which added new counts and more specifically alleged certain aspects of its original complaint. The amended complaint added the following defendants: John M. Krankel; W.S. Kirkpatrick & Co. International ("Kirkpatrick International"); International Development Corporation, S.A. ("IDC"); Emro Engineering Co., Inc. ("Emro"); Robert W. Ruppert; Ross E. Saxon; and R.H. Edwards. DIC was not named in the amended complaint. The amended complaint recited the original counts and added a defamation count against Emro and Ruppert, as well as allegations of interference with prospective contract relations against all the defendants.[2]

Kirkpatrick moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Holding, DIC, Carpenter, Krankel, Kirkpatrick International, and Edwards joined the motion brought by Kirkpatrick. These defendants are referred to herein collectively as the "Moving Defendants".[3]

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2 This case and the motions filed were reassigned to this Court by Order, dated July 16, 1986.

3 Although the Moving Defendants' motions are brought against the sufficiency of the pleadings as set forth in the original complaint, upon review of the record the issues raised by the motions are properly raised against the sufficiency of the pleadings as set forth in the amended complaint. I shall consider the motions accordingly.

The motions collectively raise four distinct issues: first, whether ETC's pleadings allege facts establishing that Carpenter and Kirkpatrick are sufficiently related to Kirkpatrick's corporate parents to warrant the inclusion of the corporate parents as defendants to this action; second, whether ETC's pleadings allege facts showing ETC suffered injury as a result of defendants' alleged antitrust and RICO violations; third, whether ETC's pleadings allege facts to establish a "pattern of racketeering activity," as required by the federal and state racketeering laws; and fourth, whether ETC's claims are barred by the act of state doctrine.[4]

II. *Facts*

In 1954, Carpenter became an employee of Kirkpatrick, a New Jersey corporation, which is involved in the business of selling and brokering aircraft equipment and facilities. At some point prior to 1978, Carpenter became a major shareholder, Chairman of the Board of Directors and Chief Executive officer of Kirkpatrick.

In 1978, Carpenter sold all of his stock and equity interest in Kirkpatrick to Holding. Also in 1978, pursuant to the terms of a consulting and employment agreement, Carpenter agreed to remain as Chairman of the Board and Chief Executive officer of Kirkpatrick for a period of five years. The stock of Holding was, at all times relevant to this motion, owned by IDC, a Luxembourg corporation.

ETC is a Delaware corporation having its principal place of business in Pennsylvania and is engaged in the business of manufacturing and selling aircraft equipment and facilities.

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[4] The results of the third and fourth issues, the RICO and the act of state portions of the motions, are applicable to those defendants who have not so moved or have not yet been served with the complaint or not yet answered the complaint.

At some point during the period 1980-1981, both ETC and Kirkpatrick or Kirkpatrick International sought to procure a contact with the Republic of Nigeria to construct an aeromedical facility at Kaduna Air Force Base in Nigeria and to provide equipment for that facility (the "Nigerian Contract"). In an effort to obtain the Nigerian Contract, Carpenter negotiated an agreement with Akindele, a Nigerian citizen (the "Akindele Agreement"), whereby Akindele was to act on behalf of certain defendants in seeking to procure the Nigerian Contract. The Akindele Agreement provided that certain defendants would pay a "commission" to two Panamanian entities controlled by Akindele if the Nigerian Contract was procured for defendants. The commission was to equal 20% of the Nigerian Contract price; a majority of the commission was to be paid, in turn, as bribes to officials of the Nigerian Government for the award of the Nigerian Contract. During this same period, ETC was negotiating with Nigerian officials to procure the Nigerian Contract, and at some point submitted a bid for the Nigerian Contract.

On March 19, 1982 the Nigerian Contact was awarded to Kirkpatrick International, a wholly-owned subsidiary of Kirkpatrick. Payments on the Nigerian Contract by the Nigerian Government began in September, 1982 and shortly thereafter defendants' payments of the agreed upon commissions to the two Panamanian entities were effected. The alleged commissions were made on four separate occasions, September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983, and totaled approximately $2 million. ETC alleges Kirkpatrick International obtained the Nigerian Contract as a result of the commissions paid or promised as bribes to Nigerian officials who otherwise would have awarded the Nigerian Contract to ETC.

Carpenter was prosecuted for a violation of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq.*

(Supp. V 1981) ("FCPA").[5] On October 2, 1985 the United States Attorney for the District of New Jersey filed in the Carpenter matter an offer of proof which was signed by Carpenter. This offer of proof establishes certain facts which include the Akindele Agreement and the payment of the commission to the two Panamanian entities in connection with the Nigerian Contract. However, the offer of proof does not establish the payment or promise of bribes to Nigerian government officials. Kirkpatrick was also prosecuted for violations of FCPA. Both Carpenter and Kirkpatrick pled guilty to violation of FCPA.

On January 6, 1986 at the sentencing of Kirkpatrick, Assistant United States Attorney Steven Levy made the following representations to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated... I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the Corporation.
>
> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns

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5 This document and a transcript of a sentencing of Kirkpatrick for violation of FCPA were submitted by ETC in opposition to defendants' motions.

> about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
>
> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals[,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names,...

(Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, l. 21 to p. 10 l. 22)* (hereinafter "Levy Representations".)

The views of the United States Department of State, dated December 10, 1986 (the "State Department Position") indicate two positions relevant to this matter:

> If the adjudication of this suit were to involve a judicial inquiry into the motivation of the Government of Nigeria's decision to award the [Nigerian] contact, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.
>
> Apart from the act of state question, however, inquires into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

State Department Position, at 2-3 (attached as Appendix A).

The government of "Nigeria was informed not later than the end of November, 1985 [of the bribery charges with regard to the Nigerian Contract] as a result of the publicity surrounding the admissions of guilt [to violations of FCPA] and sentences with respect thereto on behalf of Kirkpatrick and Carpenter...." See submission, dated August 26, 1986, of counsel to plaintiff.

On July 31, 1986 counsel for ETC forwarded a letter to the Nigerian Embassy in Washington, D.C. to request a declaration from the Republic of Nigeria "to the effect that the prosecution of this civil action in the American Federal Courts will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America." The stated purpose of this requested declaration was to nullify the defendants' "act of state" argument to dismiss ETC's complaint.

To date, it appears the Republic of Nigeria has not responded to either the publicity surrounding the FCPA prosecutions or the July 31 letter nor has it taken any action with regard to the allegations surrounding the Nigerian Contract.

III. *Discussion*

A. *Inclusion of Holding and IDC*

In its complaint, ETC appears to present two theories supporting the imputation of liability to Holding and IDC for the alleged wrongful acts of Kirkpatrick and Carpenter: first, that Carpenter acted as an agent of Holding and IDC when he negotiated the Akindele Agreement; and second, that Kirkpatrick was a "mere instrumentality" of Holding and IDC. Holding and IDC maintain ETC has failed to allege facts showing Holding and IDC are sufficiently related to, or responsible for , Kirkpatrick and Carpenter to support the imposition of liability on Holding and IDC for actions taken by

Kirkpatrick and Carpenter. In addition, Holding and IDC maintain ETC has failed to allege facts establishing Carpenter acted as an agent, servant or employee of Holding and IDC during negotiations in connection with the Nigerian Contract. In support of their position, Holding and IDC assert that ETC's pleadings on these issues establish nothing more than Holding and IDC own Kirkpatrick and that Carpenter entered into an employment contract with Kirkpatrick and/or Holding.

Whether an agency relationship exists between a parent corporation and employees or officers of its subsidiary or whether a subsidiary is an instrumentality of the parent is normally a question of fact and degree. The central factual issue is control, i.e., whether the parent corporation dominates the activities of the subsidiary. See *Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 840-41 (D. Del. 1978). *Accord, Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463, 1478 (D. Kansas 1983).

In addressing the problem of relationships between parent and subsidiary corporations, courts have cited the criteria set forth in *Fish v. East*, 114 F. 2d 177, 191 (10th Cir. 1940), to aid in determining whether a subsidiary is such an instrumentality of the parent corporation that treating the two as one is warranted. *See, e.g., Steven v. Roscoe Turner Aeronautical Corp.*, 324 F. 2d 157, 161 (7th Cir. 1963); *Hoffman*, 575 F. Supp. at 1478; *Japan Petroleum Co., Ltd.*, 456 F. Supp. at 841. The factors to be examined include ownership of the subsidiary's stock, identity of officers and directors of the corporations, financial arrangements of the corporations, responsibility over day-to-day operations of the subsidiary and payment of the subsidiary's salaries and expenses. These criteria aid the Court in determining whether:

> from all the facts and circumstances it is apparent that the relationship between the parent and subsidiary is so intimate, the parents control over the subsidiary is so dominating, and the business and assets of the

> two so mingled, that recognition of the distinct entity would result in an injustice to third-party persons....

Hoffman, 575 F. Supp. at 1478 (quoting from two other cases).

ETC's amended complaint alleges (1) that in 1978 Carpenter entered into an employment contract with Kirkpatrick and/or Holding; (2) that in 1978 Carpenter sold all of his "major" shareholdings and equity interest in Kirkpatrick to Holding; and (3) that various financial aspects of the relationships among the corporate defendants indicate they are engaged, to some extent, in a single economic enterprise.[6] Although ETC's pleadings are not exhaustive, it cannot be said, as a matter of law, the pleadings fail to allege a relationship among Holding, IDC, Carpenter and Kirkpatrick sufficient to support the potential imposition of liability upon Holding or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick.

As Holding and IDC point out in their brief, "whether an agency relationship has been created is a factual question." (Memorandum of DIC and Holding at 14.) ETC relies on *Melikian v. Corradetti*, 791 F. 2d 274, 282 (3d Cir. 1986) which, although not directly on point, provides some guidance: "[t]he issue of whether the corporate veil can be pierced is primarily a question of fact. Plaintiffs have alleged sufficient facts to state a claim and should be permitted to proceed with discovery to further develop the factual record." Accordingly, the ETC pleadings are adequate in this regard.

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6 Specifically, the amended complaint alleges that Holding is the "manager" of Kirkpatrick and that Holding has authority over financial aspects of Kirkpatrick's operations, including payments made in connection with the Nigerian Contract.

B. *ETC's Standing*

The Moving Defendants argue that under the facts pleaded in ETC's complaint, ETC lacks standing to bring its antitrust and RICO claims against them. The Moving Defendants contend ETC's pleadings fail to establish the requisite injury because there are insufficient facts pleaded to show ETC would have won the Nigerian Contract but for the improper actions of the Moving Defendants. Although the original complaint may have been insufficient, the amended complaint pleads ETC's injury sufficiently to survive these motions to dismiss. The amended complaint alleges ETC was competing with the Moving Defendants for the Nigerian Contract and "upon information and belief", but for the alleged improprieties of the Moving Defendants, ETC would have obtained the Nigerian Contract. (Amended Complaint ¶ 40.) Absent unequivocal evidence that ETC was next in line to obtain the Nigerian contract, ETC could not have pleaded its injury with more particularity. Facts may surface showing these allegations are untrue; for present purposes, however, ETC has alleged injury as a result of the actions of the Moving Defendants and has standing to bring its claims.

C. *Pattern Requirement of RICO*

RICO prohibits the use or investment of funds in an enterprise involved in interstate commerce if the funds are "derived, directly or indirectly, from a pattern of racketeering activity..." 28 U.S.C. § 1962(a). RICO defines a pattern of racketeering activity as requiring "at least two acts of racketeering activity . . . ." 28 U.S.C. § 1961(5).

ETC contends the four separate payments of the commissions and the further payment of those commissions as bribes constitute separate acts of racketeering activity to support a finding of the requisite pattern. The Moving Defendants argue RICO's "pattern" mandate requires a showing of separate criminal episodes.

Prior to the Supreme Court's decision in *Sedima, S.P.R.L. v. Imprex Co., Inc.*, _____ U.S. _____, 105 S. Ct. 3275 (1985), courts were divided over the proper construction and application of RICO's pattern of racketeering activity requirement. Some courts held multiple criminal acts in furtherance of a single criminal scheme constituted the requisite pattern. *See, e.g., United States v. Weatherspoon*, 581 F. 2d 595, 602 (7th Cir. 1978) (each mailing in furtherance of scheme to defraud constitutes a separate act of racketeering, thereby establishing a pattern). Other cases held multiple criminal episodes were necessary to establish the pattern of racketeering activity requirement. *See, e.g., Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6, 12-13 (W.D. Pa. 1981) (series of payments in single bribery scheme insufficient to establish RICO pattern).

The Supreme Court's *Sedima* decision offers some guidance in resolving the pattern controversy. Quoting from the Senate Report on RICO, the Court stated: "The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective.... S. Rep. No. 91-617 p. 158 (1969)." *Sedima*, 105 S. Ct. at 3285 n. 14. The Court's opinion then referred to another section of RICO providing that "'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act." *Id.*

Many courts have relied on footnote 14 of the *Sedima* opinion in declining to find a pattern of racketeering activity where the alleged acts were committed in furtherance of a single fraudulent scheme posing no threat of continuing activity. *See, e.g., Superior Oil Co. v. Fulmer*, 785 F. 2d 252, 255-257 (8th Cir. 1986) (several acts of mail and wire fraud in pursuit of single isolated conversion of theft claim fail to establish requisite pattern); *Emmanouilides v. Buckthorn, Ltd.*, 642 F. Supp. 964, 966 (S.D.N.Y. 1986) (several

fraudulent mail and wire communications not a pattern; "rather, they are components of a single activity, the alleged vessel fraud"); *Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F. Supp. 1532, 1534 (D. Mass. 1986) ("In applying civil RICO, therefore, it is essential to identify threats of continuing criminal activity, as opposed to isolated criminal events."); *Temporaries, Inc. v. Maryland Nat'l Bank*, 638 F. Supp. 118, 124 (D. Md. 1986) ("Without an open-ended series of activities which comprise a continuing scheme, more than one scheme should be required to establish a 'pattern' of racketeering activity"); *Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903, slip op. at 8 (D.N.J. January 9, 1986) [available on Westlaw, DCTU database] ("the repetition of an act taken against a single victim or set of victims following closely on the heels of the original wrong, in some circumscribed circumstance, is completely unidimensional. It suggests no expansion, no ongoing design, no continuity, such as was the target of Congress in RICO"); *Allington v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985) (three acts of wire fraud with single victim and scheme insufficient to establish pattern); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985) (mailing of subcontract and several kickback payments in connection with single kickback scheme insufficient to establish pattern).

Some of these courts have argued the Congressional intent behind RICO's pattern requirement was to reach only multiple criminal episodes, such an interpretation being "consistent with the connotation of multiple events implicit in the term 'pattern.'" *Carpenter*, 619 F. Supp. at 478. *See also Fulmer*, 785 F. 2d at 255-57; *Inryco*, 615 F. Supp. at 831. Other courts have asserted a RICO pattern may be established by showing the existence of either (1) more than one unlawful scheme, or (2) "an open-ended continuous scheme which contains a multiplicity of predicate acts." *Temporaries, Inc.*, 638 F. Supp. at 123. *See also Eastern Corporate Federal Credit Union*, 639 F. Supp. at 1535-36; *Kredietbank*, slip. op. at 7-8.

Identification of such an "open-ended continuous scheme" requires an assessment of various factors indicative of the scheme's "continuity." Such factors include "the length of the scheme, the number of predicate acts and the number of victims of such acts, and the likelihood that the scheme would continue indefinitely." *Temporaries, Inc.*, 638 F. Supp. at 123 n. 1A. *See also, United States v. Ianniello*, 808 F. 2d 184, 192 (2d Cir. 1986) ("when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise [RICO pattern exists]").

The second approach for dealing with RICO's pattern requirement offers greater flexibility and appears to be more in line with the Congressional intent behind enactment of RICO. Because it is possible a single unlawful "scheme" could involve sufficient instances of "racketeering activity" amounting to a "pattern" of activity warranting liability under RICO, a blanket rule that "pattern" requires more than one scheme is unsatisfactory. An approach looking for either (1) more than one scheme, or (2) an open-ended scheme, "would prevent the propelling of isolated schemes of garden variety fraud into the domain of RICO simply because several interstate phone calls were conducted. But it will leave intact the broad remedial purposes of RICO in cases in which Congress intended to provide an extraordinary remedy — those which evidence a true pattern of racketeering activity." *Temporaries, Inc.*, 638 F. Supp. at 124.[7]

ETC claims certain defendants engaged in mail and wire fraud and committed bribery in making the four separate payments to the Panamanian entities for payment to Nigerian officials. These four payments, however, were only in

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[7] Some courts since the *Sedima* decision have adopted, or favorably referred to, a broad interpretation of the RICO pattern. *See, e.g., R.A.G.S. Couture, Inc. v. Hyatt*, 774 F. 2d 1350 (5th Cir. 1985); *Systems Research, Inc. v. Random, Inc.*, 614 F. Supp. 494 (N.D. Ill. 1985). However, these cases are not controlling, and, in light of the logical reasoning of the many cases cited above, they are ultimately unpersuasive.

furtherance of the single alleged bribery scheme used to obtain the Nigerian Contract, a scheme which cannot be said to be ongoing or otherwise comprising a "multiplicity of predicate acts." As the cases cited above establish, such an allegation fails, as a matter of law, to set forth a pattern of racketeering activity as required by RICO.

The amended complaint alleges, "upon information and belief", certain defendants have engaged in other improper actions similar to those alleged to have occurred in connection with the Nigerian Contract. (Amended Complaint ¶ 57.) However, the allegation is devoid of factual support and without some such support cannot establish a RICO "pattern" of racketeering activities. RICO is, in essence, a fraud statute, and as Federal Rule of Civil Procedure 9 (b) provides, the facts giving rise to allegations of fraud must be pleaded with some degree of particularity. To hold otherwise would subvert the Congressional intent behind enactment of RICO; every fraud plaintiff could assert a RICO claim simply by pleading, upon information and belief, the existence of another scheme similar to the one truly at issue.

The inherent similarity of a common law fraud action and a federal RICO action was implicitly recognized by the Third Circuit in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F. 2d 786 (1984), *cert. denied*, 469 U.S. 1211 (1985). In that case, the Court reversed a district court dismissal of a RICO complaint. The plaintiff in the case claimed to have been defrauded by the defendant over a twenty-one month period in connection with the sale of some 700 pieces of industrial equipment. Plaintiff claimed defendant had made numerous misrepresentations and omissions in connection with the sale of the equipment, and that such conduct established a pattern of racketeering activity as required by RICO. The district court dismissed the RICO claim because "the complaint failed to set forth 'with even minimal particularity the details of the alleged fraud or misrepresentation.'" *Id.* at 791. The Third Circuit reversed, stating:

> The complaint sets forth the nature of the alleged misrepresentations, and while it does not describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation. In sum, we conclude that [plaintiff] has alleged the fraud-based offenses with sufficient particularity to withstand a motion to dismiss under Rule 9 (b).

Id, (footnote omitted). By contrast, the allegation in paragraph 57 of the amended complaint in this action cannot be said to "adequately describe the nature and subject" of related racketeering activities on the party or the defendants.

ETC has had an opportunity to amend its pleadings so as to make a prima facie showing of the existence of a RICO pattern. Because ETC has failed to demonstrate the defendants or certain of them have engaged in a pattern of racketeering activity, the RICO claims must be dismissed.[8]

D. *Acts of State*

In their Reply Memorandum, the Moving Defendants argue the act of state doctrine bars judicial determination of ETC's claims. Specifically, the Moving Defendants contend that in order to prove violations of the Robinson-Patman Act, RICO and the New Jersey Anti-Racketeering Act or any of these statutes, ETC must establish officials of the Government of Nigeria were paid or knew they would be paid bribes for awarding the Nigerian Contract to Kirkpatrick, and that but for the payment of the bribes, or promise of payment, ETC would have been awarded the Nigerian Contract. The Moving

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8 Since ETC concedes the provisions of the New Jersey Anti-Racketeering Act are to be interpreted in the same way their RICO counterpart provisions are interpreted (Brief of ETC in Opposition to Motions to Dismiss at 16), the New Jersey Anti-Racketeering claims must also be dismissed for failure to set forth the requisite "pattern of racketeering activity."

Defendants argue such proof requires a judicial investigation into acts of the Government of Nigeria or would interfere with the conduct of foreign policy by the Executive Branch of the federal government, either of which is barred by the act of state doctrine.

The act of state doctrine has been defined as one of judicial abstention from an inquiry into the validity of an act by a foreign government within the scope of its sovereignty. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964); *Williams v. Curtiss-Wright Corp.*, 694 F. 2d 300, 302 (3d Cir. 1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F. 2d 1287, 1292 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F. 2d 597, 607 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985). Over the years courts have cited several theoretical foundations for the act of state doctrine. In an early application, the Supreme Court explained the doctrine in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

This language reflects the Court's deference to the inherent nature of sovereign authority and principles of international law upon which the doctrine was traditionally applied. The Third Circuit similarly opined that an act within the sovereign power of a foreign state or by its authorized agent within the scope and authority of the office cannot be questioned or made the subject of proceedings in our courts. *Mannington Mills*, 595 F. 2d at 1292.

"The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories,

Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). It is now also recognized the foundation of the act of state doctrine is rooted in this principle — the separation of powers among the several branches of government. *Sabbatino*, 376 U.S. at 423; *Curtiss-Wright*, 694 F. 2d at 303. The separation of powers rationale is illustrated by the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino, supra*. Applying the act of state doctrine, the Court focused on protecting the basic relationships among branches of government in a system of separation of powers, and not hindering the executive's conduct of foreign policy by judicial review of foreign acts. *Id.*, at 423.

The act of state doctrine has also been interpreted through "notions of comity and a conflict of laws theory that foreign law is to be accepted as the rule of decision in passing upon acts occurring within the foreign power's jurisdiction." *Mannington Mills*, 595 F. 2d at 1292, *citing*, Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 Colum. L. Rev. 1247, 1255 & n. 36 (1977). Thus, the "act of state" is deemed valid under the law of the land where it occurred and is applied as the law of the forum.

Keeping in mind the multi-faceted reasoning offered to support the act of state doctrine, a keystone in its application is the avoidance of "passing on the validity" of acts of foreign governments and the avoidance of conduct, which if effected, "may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Sabbatino*, 376 U.S. at 423. Therefore, if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States, inquiry is foreclosed by the act of state doctrine. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F. 2d 404, 407 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). This has been held to be equally true of judicial inquiries which would

impugn or question the nobility of a foreign nation's motivations. *Timberlane*, 549 F. 2d at 607.

The act of state doctrine should not be imposed without due consideration. In determining whether it is applicable, a court must analyze the precise nature of the conduct at issue, the affect upon the parties, and the affect upon the internal affairs of the foreign sovereign and the foreign policy of this country. *See* Restatement (2d) of Foreign Relations Law of the United States § 41, Comment d.

In order for ETC to prevail on its claims under the Robinson-Patman Act, RICO and the New Jersey Anti-Racketeering Act, it must be demonstrated the defendants or certain of them intended to wrongfully influence the decision to award the Nigerian Contract by payment of a bribe,[9] that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that "but for" the payment or anticipation of the payment of the bribe, ETC would have been awarded the Nigerian Contract. Cf. *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 660 (1960); *Clavco Petroleum*, 712 F. 2d at 407; *Hunt v. Mobil Oil Corp.*, 550 F. 2d 68, 76 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Salerno v. American League of Prof. Baseball Clubs*, 429 F. 2d 1003, 1004 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). Resolution of these critical issues necessarily requires judicial inquiry into the acts of the Government of Nigeria, its officials or its representatives and, as well, may affect the conduct of foreign policy of this country. *See* Levy Representations and

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9 Decree number 38, dated November 22, 1975, of the Federal Military Government of the Republic of Nigeria lists certain prohibited corrupt practices together with the punishment for such corruption. Included within this statute is a prohibition of an individual in the employ of the government receiving or soliciting money for the showing of a favor such as the award of a contract. Decree number 38, Part I.

State Department Position. Cases interpreting the act of state doctrine suggest this is the type of situation which precludes judicial inquiry.

Review of other decisions on this point begins with *Clayco Petroleum*, a case involving a strikingly similar factual situation. In *Clayco*, an oil company sued one of its competitors under the Robinson-Patman Act and other antitrust laws alleging its competitor had made secret payments to an official of Umm Al Qaywayn[10] in order to obtain an offshore oil concession. The trial court granted defendant's motion to dismiss on the ground the action was precluded by the act of state doctrine.

The Ninth Circuit found the actions complained of to be within the purview of the act of state doctrine because the sovereign activity effectuated "public" rather than private interests.[11] *Clayco Petroleum*, 712 F. 2d at 406. In making the public versus private interest distinction, the court noted "[t]his case differs from those relied upon by [plaintiff], in which sovereign activity merely formed the background to the dispute or in which the only governmental actions were the neutral application of the laws." *Id.*

The actions which form the basis of ETC's complaint are analogous to those the *Clayco* court found to effect a public interest. Specifically the awarding of the Nigerian Contract by the Ministry of Defense is a decision which may only be made by the Government of Nigeria, its officials or representatives.

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10 The *Clayco Petroleum* court noted the government of Umm Al Qaywayn is a foreign sovereign for purposes of the act of state doctrine. *Clayco Petroleum*, 712 F. 2d at 405 n. 1.

11 The distinction between situations in which a government acts in a commercial rather than a public capacity, the "commercial exception" has not been accepted by a majority of the Supreme Court. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695-706 (1976) (White, J., joined by three other Justices).

Similarly, the offshore oil concession in *Clayco* was granted by the Government of Umm Al Qaywayn, its officials (the Petroleum Minister), or its representatives.

ETC's characterization of the act in question, as non-public or commercial, is unfounded. Whether it is the purpose or the nature of the act which determines commercial versus sovereign status, the award fo the Nigerian Contract by the Government of Nigeria is a sovereign act. For purposes of applying the act of state doctrine to the present facts, the distinctions between the grant of an oil lease and the award of a military contract are not persuasive.

Although ETC has suggested it is not in fact complaining of the actions of the Nigerian Government, its officials or representatives, and does not characterize the Government of the Republic of Nigeria or any of its agents as "co-conspirators", an indespensible ingredient of ETC's cause of action requires establishg the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate Nigerian law. Liability in this case cannot be attributed to any defendant unless ETC can prove the tendering and payment of the bribe to the appropriate Nigerian officials or at least, as ETC has suggested, the anticipation of such payment and reliance upon such anticipation by the appropriate Nigerian officials and thus the violation of Nigerian law by these government officials. The same considerations are relevant where the acts of a foreign sovereign are questioned directly or collaterally in litigation between private parties. *See Frazier v. Foreign Bondholders Protective Council*, 125 N.Y.S. 2d 900, (1953) ("immunity of a foreign sovereign, in all its implications, is not restricted to warding off only those assaults aimed directly at that sovereign as a party proper.").

The *Clayco* court followed *Occidental Petroleum Corp. v. Buttes Gas & Oil*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F. 2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). In *Occidental* plaintiff alleged the foreign sovereign issued a fraudulent territorial decree to enable the defendants, in lieu of plaintiff, to export oil and gas in the area covered by the

decree. *Occidental Petroleum*, 331 F. Supp. at 95. While noting *Occidental* involved a territorial decree not present in *Clayco*, the Ninth Circuit noted the underlying dispute in both cases concerned the decision by a foreign government authorizing the exploitation of an important natural resource. The Ninth Circuit noted "it is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy." *Clayco Petroleum*, 712 F. 2d at 407. Accordingly, it is not unrealistic to anticipate judicial scrutiny of the sovereign decisions of the Republic of Nigeria in allocating and awarding contracts with regard to military bases would, if not embarrass the political branches of our government, tend to make the conduct of our foreign policy with Republic of Nigeria more difficult and would require an exploration of the motive and intent of certain Nigerian governmental officials.

In determining whether to apply the act of state doctrine to this situation, ETC contends the court may inquire as to the motivation, rather than the validity, of the questioned activities. In support of this proposition, plaintiff cites *Williams v. Curtiss-Wright Corp., supra*, the Third Circuit's most recent decision in this area. The facts in *Curtiss-Wright*, however, are distinguishable and do not preclude application of the doctrine in this case.

The parties in *Curtiss-Wright* were competitors in the sale of used jet engines, parts and accessories to foreign governments. Plaintiff charged defendant with antitrust and other related state law violations. Specifically, plaintiff alleged defendant monopolized the market and engaged in the common law torts of disparagment, unfair competition, and interference with prospective economic advantage, all of which prevented plaintiff from competing in the worldwide market of reconditioned parts for aircraft engines. *Curtiss-Wright*, 694 F.2d at 301. The complaint regarded the foreign governments, not as participants in the wrongdoing against plaintiff, but as co-victims of the alleged antitrust activity of plaintiff corporation. Accordingly, the thrust of plaintiff's challenges

were the anti-competitive effects of the Curtiss Wright activities and not the validity or motivation of the conduct of foreign governments. Resolution of plaintiff's claims did not require inquiry into the motivation of foreign governments. *Id.* at 303-304.

In contrast to the allegations of the complaint in *Curtiss-Wright,* the amended complaint filed by ETC alleges by necessary implication the involvement by high Nigerian Government officials in the corrupt practices and requires the motivation of these government officials, if not the government as an entity, be examined in order for ETC to prevail on its claims. ETC alleges Akindele acted as the local agent in Nigeria for certain of the defendants in order to secure the Nigerian Contract. As a result of Akindele's efforts the Nigerian Contract was negotiated at a rate which was allegedly twenty percent higher than would be expected in order to provide defendants with the capital to pay the commissions /bribes. In substance, the negotiations and consequent award for the Nigerian Contract, as alleged in the amended complaint, were the result of the Nigerian Government or certain Nigerian officials participating fully in the scheme and agreeing to pay an increased price in order to provide money for the bribes for various Nigerian governmental-political and military figures.

Although the decision in *Hunt v. Mobil Oil Corp., supra,* concerned claims based upon expropriation, the judicial examination of which is traditionally recognized as barred by the act of state doctrine (such circumstances are not present in ETC's alleged complaint), *Hunt* is nevertheless instructive in the weighing process used to determine whether the act of state doctrine is to be applicable. In *Hunt* it was claimed but for an alleged conspiracy, the business of the plaintiff would have continued to thrive. The Second Circuit agreed with the District Court that such allegations "necessarily would require a wholesale examination of Libyan policy — how did it treat other companies, what provoked its 'displeasure,' how far could concessions by Hunt appease Aresident al-Qadhafi," *Hund,* 550 F. 2d at 78.

Similarly, in this case, in addition to proving the bribe was in fact paid to or anticipated by Nigerian officials, inquiry would have to be had as to the effect of the payment or promise of payment of such a bribe, whether in fact the payment or anticipation of the bribe caused the award of the Nigerian Contract to Kirkpatrick International and whether ETC could have obtained the contract had the bribe not been paid or anticipated. Inquiry into the motivation of the Nigerian government, to the extent anticipated in *Hunt*, appears to be necessary for resolution of this case.[12]

In certain situations, the act of state doctrine has been limited to discretionary, not ministerial acts of a foreign government. For example, in *Mannington Mills* the issue presented to the Third Circuit was the issuance of a patent by a foreign government. This action was regarded by the Third Circuit as ministerial or an insignificant act of the sovereign. The granting of patents *per se* was found not to be within the perview of the act of state doctrine since it is not the type of sovereign activity that would cause substantial concern to the executive or legislative branches of our government.[13] Accordingly, there was no reason to bar the suit because of foreign policy concerns. *Mannington Mills*, 595 F. 2d at 1294. In this same vein, the Supreme Court decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) is recognized to stand for a commercial exception to the act of state doctrine. *See* n. 11, *supra*. This exception in essence acknowledges that when a government acts in a commercial mode it is not acting as a sovereign and therefore the doctrine is inapplicable.

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12 In *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 908 n. 24 (E.D. Mich. 1981), the court sought to distinguish a "kickback" in a situation which is not relevant to this litigation.

13 It is noted *Mannington Mills* did not create an exception to the act of state doctrine based on the ministerial-discretionary dichotomy. *See Curtiss-Wright*, 694 F. 2d at 303.

Clayco Petroleum is also significant because the Court distinguished application of FCPA and indicated the FCPA is not an exception to the act of state doctrine. *Clayco Petroleum* indicates FCPA was intended to stop bribery and noted both the Justice Department and the Securities and Exchange Commission share enforcement responsibilities under FCPA. The opinion noted that any governmental enforcement represents a judgment of the Executive Branch on the wisdom of bringing a proceeding in light of the exigencies of foreign affairs. Act of state concerns are thus inapplicable, to the extent of a FCPA prosecution, since the purpose of the doctrine is to prevent the judiciary from interfering with the conduct of foreign affairs. *Clayco Petroleum*, 712 F. 2d at 408-409, *citing*, *Sabbatino*, 476 U.S. at 423; *Timberlane*, 549 F. 2d at 605. *Clayco Petroleum* also suggests it is the screening of governmental proceedings, with state department consultation, which distinguishes FCPA enforcement from private suits. In private suits, the act of state doctrine remains necessary to protect proper conduct of national foreign policy. *Id.* 712 F. 2d at 409.

Significantly, prosecution was had against both Carpenter and Kirkpatrick. The offer of proof executed by Carpenter is carefully worded and does not establish any bribes were in fact paid to a member of the Nigerian Government although it adequately sets forth the requirements to establish Carpenter intended such action to take place. Thus, a violation of FCPA was demonstrated. Likewise, the transcript with regard to the sentencing of Kirkpatrick for the violation of FCPA sets forth the concern of the United States Government and the lack of a disclosure order from the State Department with regard to the allegations of bribery concerning the Nigerian Contract. Read together, these documents indicate a conscious decision on behalf of the Executive Branch through the Department of State for a limited prosecution under FCPA (limited in the amount of disclosure of facts) and the efforts of the Government in resisting attempts by the Nigerian Government in discovering

information with regard to what Carpenter knew of the payment of the bribes.[14]

In light of the State Department Position, ETC has suggested application of a form of the so-called "Bernstein" exception to the act of state doctrine.[15] The State Department Position indicates: "As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question." Additionally, the State Department states that judicial inquiry into "motivations of the Government of Nigeria's decision to award the [Nigerian C]ontract" would not be precluded by the act of state doctrine. The State Department

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[14] In addition to all of the allegations in the amended complaint which allege by necessity Nigerian Government involvement, Article XX of the Nigerian Contract provides that "[t]his Agreement shall be governed, interpreted and controlled by the laws of the Federal Republic of Nigeria...." In Article XXI of the Nigerian Contract provides for disputes "to be submitted to an Arbitration Court convened under the rules as provided under the Arbitration Laws of Nigeria...." To date, the government of the Republic of Nigeria has not taken any steps to reputiate the acts of its governmental officials. This inaction is significant.

It has been noted in two decisions that unreputed acts of a foreign government can be scrutinized if they resulted from corruption of government officials. *Sage Intern*, 534 F. Supp. at 910; *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979). *Sage* relies upon *Gulf & Western* and *Gulf & Western* cites *Hunt*, 550 F. 2d at 79 as authority for this statement. However, *Hunt* specifically states: "This appeal therefore is not the proper vehicle for consideration of international commercial bribery insofar as it affects the act of state doctrine." *Id.*

[15] In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (Brennan, J., dissenting) *reh'd denied*, 409 U.S. 897 (1972) a plurality of the Supreme Court adopted the "Bernstein" exception. "[W]here the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." *Id.*

Position, however, goes on to note inquiries into the motivation and validity of actions by foreign states and discovery against foreign government officials may seriously affect United States foreign relations. (Appendix A). As such the State department fails to clearly "sign off" on the application of the act of state doctrine in this case.

The State Department opines that:

> inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials *may seriously affect United States foreign relations*. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at *each relevant stage* in the proceedings. Moreover, *the court should* endeavor to *assure* that *no unnecessary inquiries* are made, *or allegations* tested during the course of discovery or trial.

(Appendix A, emphasis added). It is significant that in light of this caution, *this court* is urged "to assure that no unnecessary inquiries are made, or allegations, tested during the course of discovery or trial."[16] *Id.*

The overview and judgments of this court, as urged by the State Department, may well have a significant impact on the foreign affairs of this country — an area of decision-making

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16 For example, a consideration of this concern of the State Department clearly would have to include the issuance of a subpoena for records in Nigeria. Since such an action may well affect the foreign relations of this country, a court must weigh the interests of this country and Nigeria before issuing such a subpoena. A court must give "deference to the determination by the Executive Branch — the arm of the government charged with primary responsibility for formulating and effectuating foreign policy — that the adverse diplomatic consequences of the discovery request would be outweighed by the benefits of disclosure." *United States v. Davis*, 767 F. 2d 1025, 1035 (2d Cir. 1985) (citations omitted). This is not what is suggested by the terms of the State Department Position.

the Constitution largely commits to the discretion of the Executive. Before launching investigations on foreign soil, or of foreign nationals, or of matters implicating international diplomacy, the Executive has the option to weigh the implications of such conduct on the overall foreign policy of this country. This obviously will not happen in the scenario suggested by the State Department Position.

Equally important to this court's determination of whether the parties to this matter are making unnecessary inquiries or testing unnecessary theories is whether there is any risk to national security. The Executive Branch must make the decisions as to whether disclosure of facts will have any ramification on disclosure of intelligence sources as well as on diplomatic relations. In this regard, as noted earlier, Carpenter's offer of proof upon which his criminal conviction for violating FCPA is based is carefully and narrowly worded. It cannot be said such careful wording is without intent or significance. See, the Levy Representations.

The significance of the impact of this case on the Government of Nigeria (see the Levy Representations) and on the conduct of this country's foreign policy (see the State Department Position) is obvious. The suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate. Such a precedent poses a serious threat to the authority of the Executive Branch to conduct foreign policy.[17]

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17 No individual who is responsible for or knowledgeable of this nation's foreign policy or security will be in a position to know of the pretrial and trial decisions and evaluate their impact on foreign policy. Moreover, even if such person were available to the court, counselling the court for or against such decisions would pose serious problems of, at the least, an appearance of impropriety. Moreover, such a procedure (although not explicitly suggested by the State Department) would bring the basic separation of powers rule into question. "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." 1

(Footnote continued)

Article III courts must " 'carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.' " *Muskrat v. United States*, 219 U.S. 346, 355 (1911) (citation omitted). The essence of judicial power is the resolution of cases or controversies. *Id.* at 356. There is a notable absence of Constitutional authority for a court to assume responsibility for the conduct of a segment of foreign policy, which is what the State Department suggests.

Neither Congress nor the Executive may vest in or assign to judges holding office under Article III powers beyond those clearly confined to them by the Constitution. Nor may courts exercise such powers if granted or delegated. *See Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Muskrat*, 219 U.S. at 356; *Ex Parte Siebold*, 100 U.S. 371, 398 (1879).

There are foreign policy considerations involved in ETC's providing its cause of action. Proof by ETC requires, as mentioned, establishment of corruption by high Nigerian Government and military officials and necessarily implies a criticism of the Republic of Nigeria with regard to its failure to date to take action against government officials involved and/or other individuals involved. The July 31 letter from counsel to ETC to the Republic of Nigeria requesting a declaration of approval with regard to this civil litigation, even if a Nigerian response is forthcoming, is not dispositive of the issues. Indeed, it is the conduct of foreign policy by the Executive and Legislative Branches of this Government which must be controlling.

ETC's amended complaint is aimed at alleged antitrust and RICO violations of defendants which require inquiry into the actions, conduct and motivation of the Republic of Nigeria and its agents. Although "[t]he act of state doctrine should not be applied to thwart legitimate American regulatory goals in the

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Annals of Congress 581, (quoted in *Myers v. United States*, 272 U.S. 52, 116 (1926)).

absence of a showing that adjudication may hinder international relations[,]" *Curtiss-Wright*, 694 F. 2d at 304 (citation omitted), I am satisfied the Moving Defendants have established[18] the actions, conduct and motivation of the Republic of Nigeria and its agents are "...basic and fundamental to the alleged antitrust [,RICO and other] behavior and [are] more than merely peripheral to the overall [alleged] illegal course of conduct." *Mannington Mills*, 595 F. 2d at 1293. Moreover, the suggestion of the State Department is neither practical nor constitutional. The motion to dismiss because of the act of state doctrine is granted.

E. *Appeals of Magistrate's Orders*

1. *Standard of Review*

Also before the Court are three appeals of orders entered by Magistrate Hedges, two of which are discovery related and the third sustains Carpenter's claim of privilege against self-incrimination which defendant asserted at his deposition. In considering each of the three appeals, the Court must apply the standard of review of a magistrate's order as set forth at 28 U.S.C. § 636 (b) (1) (A), Fed. R. Civ. P. 72 (a), and Rule 40(a) of the Local Rules of the United States District Court for the District of New Jersey. The Third Circuit has held a magistrate's order can be set aside only if it is found to be clearly erroneous or contrary to law. *Cipollone v. Liggett Group, Inc.*, 785 F. 2d 1108, 1113 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

"A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire *record* is left with the definite and firm conviction that a mistake has

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18 It is the burden of the Moving Defendants to establish the applicability of the act of state doctrine. *Curtiss-Wright*, 694 F. 2d at 303 n. 4, *citing Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 684 (1976).

been committed." *Agricultural Services Assn., Inc. v. Ferry-Morse Seed Co.*, 551 F. 2d 1057, 1071 (6th Cir. 1977), *quoting United States v. Gypsum Co.*, 333 U.S. 364, 365 (1948). Several courts have also held that a magistrate's order in a discovery dispute is subject of great deference and will only be reversed if found to be an abuse of discretion. *See Detection Systems, Inc. v. Pittway Corp.*, 96 F.R.D. 152, 154 (W.D. N.Y. 1982); *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 95 F.R.D. 398, 399 (S.D. N.Y. 1982), *aff'd* 814 F. 2d 90 (2d Cir. 1987).

2. *Appeal from the May 30, 1986 Order*

ETC appeals from an order entered by Magistrate Hedges on May 30, 1986[19], which stayed plaintiff's discovery pending disposition of the motions to dismiss.

The court converted the defendants' motion to dismiss into a summary judgment motion only on the limited question of the applicability of the act of state doctrine because of the additional submissions. In response, ETC filed the instant appeal on the incorrect assumption that additional discovery on the act of state is necessitated. Accordingly, ETC appeals on the ground that the magistrate's order is "an abuse of discretion and contrary to law" (ETC's Notice of Appeal) because ETC is deprived of conducting discovery which may produce facts relevant to the act of state issue. However, applicability of the act of state doctrine (*see* Section D) is purely a legal question, the resolution of which requires no further factual development. Furthermore, additional discovery is inconsistent with the conclusions regading [sic] the act of state doctrine. The taking of discovery by ETC would necessarily

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19 This appeal was not filed within the time limit prescribed by Local Rule 40(b) (4) (a), however, due to the somewhat confusing circumstances surrounding these motions, it shall be considered. The Affidavit of Alan A. Turner dated September 10, 1986, and the Memorandum of Law in Support of the Notice of Appeal submitted in connection with this motion detail the facts regarding these circumstances.

involve inquiry into the action of the Nigerian Government and its officials.

Applying the limited standard of review mentioned previously, ETC has not demonstrated the magistrate's order is clearly erroneous or contrary to law. Only after the court posed questions to counsel regarding the act of state question did ETC seek further discovery which was unnecessary for the motion. At the present juncture, additional discovery is contrary to the application of the act of state doctrine. Accordingly, the magistrate's order is affirmed.

3. *Appeal of the July 16, 1986 Order*

During his June 30, 1986 deposition Carpenter asserted his privilege against self-incrimination and refused to answer certain questions. Magistrate Hedges sustained Carpenter's claim of privilege in a Letter-Order and Opinion, dated July 16, 1986. This appeal followed.[20]

Prior to his deposition, Carpenter submitted an affidavit (the "Carpenter Aff.") setting forth his reasons for fearing criminal prosecution in Nigeria and detailing the factual bases for assertion of the privilege. As discussed earlier in this opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media coverage and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. (Carpenter Aff., ¶ 2) Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian Contract. (*Id.* at § 3) Akindele further warned Carpenter not to travel to Nigeria and to exercise extreme care

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20 Disposition of the appeal was postponed until oral argument and decision on the motion to dismiss.

in travelling in Europe or Africa because there was a risk he would be taken by force to Nigeria. (*Id.* at ¶ 4)

In January, 1986, Carpenter's attorney was informed by a United States Government official that "the Nigerians wanted to get [Carpenter] to Nigeria." (*Id.* at ¶ 5) This information, which originally came from Interpol, was relayed to Carpenter. (*Id.* at ¶ 5) Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated." (*Id.* at ¶ 6)

In sustaining Carpenter's Fifth Amendment privilege, Magistrate Hedges applied the guidelines set forth in *United States v. Flanagan*, 691 F. 2d 116 (2d Cir. 1982). In *Flanagan*, defendant was subpoenaed to appear before a federal grand jury which was investigating an alleged gun-smuggling conspiracy in operation for the benefit of the Irish Republican Army in Ireland. After his intent to invoke the Fifth Amendment was known, defendant Flanagan was granted immunity from the use of his testimony against him in any subsequent criminal proceeding. *Id.* at 119.

Flanagan's motion to quash the subpoena was based in part on the argument that because the grant of immunity would not protect him from prosecution in foreign countries, a protection coexistive with the Fifth Amendment privilege. Although the Second circuit found "Flanagan's fear of foreign prosecution, viewed objectively, [to be] remote and speculative rather than real, reasonable, or substantial" *id.* at 122, the court's discussion of factors to be considered in making such a ruling is helpful.

Among the factors detained in *Flanagan* are the "reality or remoteness of the risks of incrimination under foreign law" *id.*, the existence of foreign laws authorizing prosecution of the criminal acts in question, whether the testimony may enable the foreign government to seek extradition, and whether the testimony is likely to be disclosed. *Id.* at 120-23. In his decision, Magistrate Hedges considered these factors as

applied to Carpenter and concluded the privilege should be upheld.

On appeal, ETC contends the protection afforded by the Fifth Amendment is not available to Carpenter because he has already pled guilty to a violation of the Foreign Corrupt Practices Act. Furthermore, ETC disputes the existence of a real threat of prosecution. Alternatively, ETC suggests the testimony should be taken under a protective order.

The Fifth Amendment guarantees every person freedom from self-incrimination and protects a witness against providing testimony "leading to the inflictions of penalties affixed to ... criminal acts." *Kastigar v. United States*, 436 U.S. 441, 453 (1972) *reh'g denied*, 408 U.S. 931 (1972) (citations omitted). The protection is available where the testimony "would furnish a link in the chain of evidence needed to prosecute" the witness for a crime, provided "the witness has reasonable cause to apprehend danger from a direct answer." *Hofman v. United States*, 341 U.S. 479, 486 (1951). Consideration of ETC's arguments necessitate a review of the standard for invoking claims of the Fifth Amendment privilege.

The extent to which the Fifth Amendment privilege may properly be asserted on the grounds of potential prosecution in foreign countries is unclear. *United States v. Kowalchuk*, No. 77-118, slip op. (E.D. Pa. Oct. 20, 1978).[21] There is, however, agreement that the Fifth Amendment only protects against real and substantial threats of incrimination, not speculative or theoretical possibilities. *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472, 478 (1972). In assessing the severity of threat, one court has found there to be a

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[21] This unreported decision was included in Carpenter's opposition to the appeal and was therefore available to all counsel.

> common theme to all of the reported cases in that questions relating directly to criminal activities in foreign countries pose a more serious threat of incrimination than do questions about events and activities within this country having only direct and remote connection to foreign culpability.

Kowalchuk, slip op. at 4, citing *In re Parker*, 411 F. 2d 1067 (10th cir. 1969), *vacated as moot, Parker v. United States*, 397 U.S. 96 (1970); *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972).

ETC contends the Fifth Amendment protection is not available to Carpenter in light of Carpenter's previous plea of guilty to violation of the FCPA. This argument is not persuasive for two reasons. First, there would be no need to depose Carpenter if the information sought had been disclosed in connection with Carpenter's earlier prosecution. It is logical then to assume the requested information goes beyond the investigation under the FCPA. Therefore, Carpenter may invoke the Fifth Amendment to avoid further incrimination. Second, case law supports protection of Carpenter's testimony because prior disclosure is not held to be a waiver of the privilege. *United States v. Yurasovich*, 580 F. 2d 1212, 1218-1220 (3d Cir. 1978).

> The initial statement is incriminating, a subsequent statement on the same subject would necessarily be further incriminating because the second statement would cooroborate the earlier statement, making it more difficult for the witness to discount the earlier statement and hence increasing the danger of conviction.

Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F. Supp. 45, 49 (S.D.N.Y. 1982) *quoting E.F. Hutton & Co. v. Jupiter Development Corp.*, 91 F.R.D. 110, 115 (S.D.N.Y. 1981).

ETC also challenges Carpenter's assertion of the Fifth Amendment on the ground that Carpenter's fear of foreign prosecution is not founded. This argument ignores certain relevant facts. As previously detailed, Carpenter has been informed on more than on occasion of the danger he faces by travelling in Europe or Africa (Carpenter Aff. at ¶ 4) and of Nigerian official's desire to prosecute him. (*Id.* at ¶ 3) These facts are not properly ignored because determinations as to whether the privilege is justified are to be made by the trial court based on the particular circumstance of each case. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Furthermore, contrary to ETC's contentions, a pending foreign prosecution is not a prerequisite to Fifth Amendment protection. *See Kawalchuk*, slip op. at 8 ("[t]he actual pendency of criminal proceedings is not a perrequisite to the successful invocation of the Fifth Amendment privilege."), *In re Cardassi*, 351 F. Supp. at 1085 (interpreting *Zacarelli*, not to require any indication that a foreign prosecution is "imminent.").

The magistrate's decision to uphold Carpenter's Fifth Amendment claim has not been shown to be clearly erroneous or contrary to law. Based on the magistrate's thorough discussion and this court's independent analysis of the relevant facts and applicable case law, the magistrate's decision shall be affirmed.

4. *Appeal of the January 20, 1987 Order*

As part of discovery, ETC issued a deposition notice and subpoena *duces tecum* to Steven Levy, an attorney with the Department of Justice. ETC sought Mr. Levy's deposition and production of materials obtained by Mr. Levy in connection with an ongoing grand jury investigation. The United States of America ("the Government") moved to quash the subpoena pursuant to Rule 26 (c) Fed. R. Civ. P.

On January 20, 1987, Magistrate Hedges granted in part and denied in part the Government's motion to quash, and

ETC appealed. At oral argument it was determined the issues on appeal had been rendered moot because the subpoena was withdrawn. (3/6/87 Tr. 61:6-13)

Conclusion

Because ETC's amended complaint alleges facts sufficient, for the purposes of these motions to dismiss the pleading, to establish a relationship among Holding, IDC, Carpenter and Kirkpatrick to support the potential imposition of liability upon Holding and IDC for wrongful actions of Carpenter and Kirkpatrick, the motion to dismiss Holding and IDC as defendants is denied.

Because ETC's amended complaint alleges that ETC failed to procure the Nigerian Contract because of the alleged antitrust and RICO violations committed by defendants, the motion to dismiss those claims for lack of standing is denied.

Because ETC has failed to allege in its pleadings facts establishing a pattern of racketeering activity as required under RICO and the New Jersey Anti-Racketeering statutes, the motion to dismiss ETC's anti-racketeering claims is granted.

Because of the act of state doctrine, the motion to dismiss ETC's complaint against the defendants is granted.

The parties have agreed to dismiss without prejudice counts five and six of the complaint.[22] Accordingly, counts one, two, three, four and seven are hereby dismissed with prejudise; counts five and six are dismissed without prejudice pursuant to agreement of counsel.

Dated: April 24, 1987

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[22] See letter of March 16, 1987 from counsel on behalf of Emro and Ruppert to counsel for plaintiff.

(Exhibit A to April 24, 1987
Opinion of Judge Lechner)

December 10, 1986 Letter to Abraham D. Sofaer to the Hon. Alfred J. Lechner, Jr., is reproduced at A-267-269.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,	)	CIVIL ACTION NO. 86-796
Plaintiff	)	
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*,	)	
	)	NOTICE OF APPEAL
Defendant	)	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff Environmental Tectonics Corporation, International hereby appeals to the United States Court of Appeals for the Third Circuit from the final Judgment entered in this action on the 1st day of May, 1987.

RUTTER, TURNER & STEIN

By _____
Thomas B. Rutter
872 Public Ledger Building
Independence Square
Philadelphia, PA 19106
(215) 925-9200
Attorney for Plaintiff

RUTTER, TURNER & STEIN

By _____
Alan Turner
209 Haddon Avenue
Haddonfield, NJ 08033
(609) 429-6022
Attorney for Plaintiff

Dated: May 12, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5328 and 87-5546

ENVIRONMENTAL TECTONICS

v.

W.S. KIRKPATRICK INC.,
DEVELOPMENT INTERNATIONAL CORPORATION,
DIC (HOLDING) INC.
IDC INTERNATIONAL
S.A. LUXEMBOURG
HARRY G. CARPENTER
c/o W.S. Kirkpatrick, Inc.
and
BENSON "TUNDE" AKINDELE
JOHN M. KRANKEL, EMRO ENGINEERING CO., INC.
ROBERT W. RUPPERT c/o EMRO ENGINEERING CO., INC.
ROSS E. SAXON c/o NAUTILUS ENVIRONMENTAL
SYSTEMS, INC.
& R.H. EDWARDS

Environmental Tectonics
Corporation International
Appellant in 87-5328

W.S. Kirkpatrick & Co., Inc.,
W.S. Kirkpatrick & Co.,
International and D.I.C.
(Holding) Inc.

Appellants in No. 87-5546

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 86-0796)

Argued November 20, 1987

BEFORE: GREENBERG and SCIRICA, Circuit Judges and POLLAK, District Judge*

(Filed May 2, 1988)

THOMAS H. SEAR, ESQ. (Argued)
RHONDA D. ORIN, ESQ.
SPENGLER, CARLSON, GUBAR, BRODSKY & FRISCHLING
280 Park Avenue
New York, NY 10017

Attorneys for Appellee-Cross-Appellant, W.S. Kirkpatrick & Co., Inc. et al.

THOMAS B. RUTTER ESQ. (Argued)
RUTTER, TURNER & STEIN
872 Public Ledge Building
Philadelphia, PA 19106

Attorney for Appellant-Cross-Appellee, Environmental Tectonics International, Inc.

THEODORE V. WELLS, JR., ESQ.
ROBERT L. KRAKOWER, ESQ. (Argued)
LOENSTEIN, SANDLER, KOHL, FISHER & BOYLAN
65 Livingston Avenue
Roseland, NJ 07068

Attorneys for Appellee-Cross-Appellant, Harry G. Carpenter

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

POLLAK, District Judge:

Appellant Environmental Tectonics Corporation International ("ETC"), a Pennsylvania corporation, brought this action to recover damages against several defendants for, *inter alia*, violations of the federal Racketeering Influenced Corrupt Organizations Acts, 18 U.S.C. § 1962-1968, the New Jersey Anti-Racketeering Act, 2C N.J.C.S. § 41-1, and the Robinson-Patman Act, 15 U.S.C. 13(c). Essentially, ETC claims to have been injured by an apparently successful scheme, allegedly participated in by all of the defendants, to influence the award of a Nigerian defense contract through bribery of Nigerian government officials. The district court concluded that the act of state doctrine barred adjudication of ETC's claims, and dismissed the action in its entirety. In the alternative, the court also ruled on other substantive and procedural issues.

I.

This action arose from the award of a contract by the Federal Republic of Nigeria to defendants W. S. Kirkpatrick & Co. ("Kirkpatrick") and W. S. Kirkpatrick & Co. International ("Kirkpatrick International"), both of which are New Jersey corporations. Kirkpatrick is in the business of selling and brokering aircraft equipment, parts and facilities to airlines and foreign air forces. Kirkpatrick International, its whollyowned subsidiary, was formed to carry out Kirkpatrick's duties under the contract to be awarded by the Nigerian government. Also named as defendants were Kirkpatrick's parent corporations, DIC (Holding) Inc. ("DIC"), a Delaware Corporation, and International Development Corporation, S.A. ("IDC"), a Luxembourg corporation.

In 1980, when the events alleged in the amended complaint[1] began, defendant Harry Carpenter was chairman of Kirkpatrick's board of directors and the company's chief executive officer. In 1980, Carpenter learned that the Nigerian government was interested in purchasing aeromedical equipment, and in constructing and equipping an aeromedical center for the Nigerian Air Force at Kaduna Air Force Base (the "Air Force contract"). Kirkpatrick contracted with defendants Emro Engineering Co., Inc. ("EMRO") and Nautilus Environmedical Systems, Inc. ("Nautilus") to provide engineering, design and related assistance needed to build the proposed facility and to supply the equipment.

Carpenter hired a Nigerian national, defendant Benson ("Tunde") Akindele, to act as Kirkpatrick's local agent in all matters pertaining to the Air Force contract. In or around March of 1981, Carpenter and Nautilus president Ross Saxon[2] met with Akindele to discuss their bid strategy. According to a contemporaneous memorandum written by Carpenter, Akindele told Carpenter and Saxon that to secure the bid Kirkpatrick should be prepared to pay a sales commission totalling twenty percent (20%) of the contract price. Most of this commission was to be paid to Nigerian political and military officials.[3] Akindele explained that Nigerian officials generally expected such payments from contract bidders, and that American companies often lost Nigerian defense contracts to their European competitors because they failed to make such arrangements.

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[1] The following factual recital is based primarily on the amended complaint.

[2] Saxon and Robert Ruppert, Emro's president, were also named as defendants. Two other Kirkpatrick officers, Robert H. Edwards and John M. Krankel, were named as well.

[3] ETC alleged in its complaint that the 20% commission was to be distributed as follows: 2 1/2% for Akindele, 5% for the Nigerian Air Force, 2 1/2% for the medical group, 5% for a political party, 2 1/2% for the relevant cabinet minister, and 2 1/2% for other key defense personnel.

Through a written agreement with Akindele, Kirkpatrick agreed to pay the commissions to two Panamanian corporations. In May of 1981, these corporations — which were controlled by Akindele — were established to receive the commissions and to distribute them to Nigerian officials. On March 19, 1982, the Nigerian Defense Ministry entered into an agreement awarding the Air Force contract to Kirkpatrick International. In September of 1982, the Nigerian government made the first of four contract payments to Kirkpatrick. The remaining payments were made in December of 1982, in February of 1983, and in August of 1983. After each of the four contract payments, the defendants via the United States mails and wire transfers paid a portion of the promised commissions to Akindele's Panamanian corporations, whence the monies were distributed to Nigerian officials. In the end, Kirkpatrick's commission payments to the Panamanian corporations, and thus, to Akindele and various Nigerian officials, totalled over $1.7 million.

In the latter half of 1981 and 1982, while Kirkpatrick was implementing the bid strategy described above, ETC, which is also in the business of selling aeromedical equipment to foreign governments, was preparing its own bid for the Air Force project. ETC submitted its pricing information to the Nigerian government in February of 1981, and it continued in contact with Nigerian military and diplomatic officials throughout the course of that year. ETC's president met with Nigerian officials in Nigeria, and submitted a formal bid for the Air Force contract in December of 1981. ETC submitted its final formal bid in February of 1982, a month before the Nigerian government awarded the contract to Kirkpatrick.

ETC states that it decided to investigate the Nigerian government's award of the Kaduna contract to Kirkpatrick in April of 1983, after learning that its bid had been far lower than Kirkpatrick's. ETC reported its findings to the Nigerian Air

Force[4] and to the United States Embassy in Lagos, Nigeria. After an investigation by the United States Justice Department, Carpenter and Kirkpatrick each were charged with violating the Foreign Corrupt Practices Act, 15 U.S.C. §78dd-2 (hereinafter "FCPA").

As part of its plea negotiations on the United States charges, Kirkpatrick and Carpenter both agreed to offers of proof which outlined the Air Force contract scheme in its entirety, including Carpenter's hiring of Akindele, and Akindele's control of the Panamanian corporations. Both offers of proof also stated that Akindele and Carpenter agreed that the money paid to the Panamanian corporations as commissions would be distributed to Nigerian political and military officials. Carpenter and Kirkpatrick both pled guilty to one FCPA violation, and were eventually sentenced: Carpenter to two hundred hours of community service and a fine of $10,000, and Kirkpatrick to a fine of $75,000, payable over a five-year period.[5]

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[4] Both bribery and the acceptance of a bribe by a government official are illegal under Nigerian law. *See* Decree No.38 (November 22, 1975) in Federal Republic of Nigeria Official Gazette Extraordinary, No. 59, December 2, 1975.

[5] At Kirkpatrick's sentencing on January 6, 1986, Assistant United States Attorney Steven Levy, who was in charge of Carpenter's and Kirkpatrick's prosecutions, made the following representation to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated [sic]. ...I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.

(Footnote continued)

ETC filed this action shortly after Kirkpatrick's sentencing. Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which contended, *inter alia*, that the plaintiff had failed to allege a "pattern of racketeering activity" as required by the federal and state RICO statutes. ETC filed an amended complaint that responded to some of the issues raised by the defendants' motion to dismiss, and that added common law counts to ETC's antitrust, RICO, and antiracketeering counts. ETC also filed an answer to the remainder of the defendants' motion to dismiss.

In their reply to ETC's answer to their motion, defendants moved for dismissal of the action in its entirety on act of state grounds. The district court requested further submissions from the parties in the form of answers to specific questions. The court also requested a *Bernstein* letter, i.e., an opinion from the State Department on whether the act of state doctrine should be applied in the circumstances presented by this case.[6] Legal Adviser Abraham Sofaer responded to the

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> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]apartment has its concerns about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
>
> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals [,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names,....

Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, l. 21 to p. 10 l. 22.

[6] The term "*Bernstein* letter" is derived from the Second Circuit's opinion in *Bernstein v. N.V. Nederalandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2nd Cir. 1954). Plaintiff Bernstein, a

(Footnote continued)

court's request in a letter dated December 10, 1986, which is appended to this opinion. Treating defendants' motion to dismiss as a motion for summary judgment, the district court dismissed the action on act of state grounds. *See Environmental Tectonics Corp., International v. W. S. Kirkpatrick & Co., Inc.*, 659 F. Supp. 1381, 1391-98 (D.N.J. 1987).

Although the dismissal on act of state grounds embraced ETC's entire claim against all the defendants, the district court went on to rule, in the alternative, on other issues: The court rejected defendants' contention that ETC lacked standing to assert antitrust and RICO claims. The court did, however, dismiss the RICO count for failure to allege a pattern of racketeering activity. For the same reason, the court dismissed the New Jersey Anti-Racketeering count. In addition, the court upheld a magistrate's determination that Carpenter was entitled to decline to answer, on Fifth

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German national, owned a corporation that was confiscated by the Nazi government during World War II. The corporation's main asset was a ship; Bernstein was forced to relinquish title to the ship, as well as all other interest in the corporation. The Second Circuit initially dismissed Bernstein's suit against the ship's subsequent owners on act of state grounds. *See Bernstein v. Van Heygen Freres Societe Anonyme*, 186 F..2d 246 (2nd Cir. 1947). The court reversed itself after receiving a letter from the State Department's Legal Adviser, which stated that it was United States policy to permit the courts to exercise jurisdiction over claims to recover property expropriated by Nazi officials.

The Supreme Court subsequently determined that, while it was proper for a federal court to consider a *Bernstein* letter, the Legal Adviser's recommendation in any given case was not to be considered binding on the court. In *First National City Bank v. Banco Nacional de Cuba*. 406 U.S. 759 (1972), Justice Rehnquist, announcing the judgment of the court, argued that the federal courts should defer to the view of the State Department; but only two other members of the court, Chief Justice Burger and Justice White, joined in his opinion. Justices Douglas and Powell, each of whom concurred separately, rejected the view that the State Department's view should control. So, too, did Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun in dissent.

Amendment grounds, certain questions put to him on deposition. Finally, the court held that ETC's amended complaint adequately stated a case for holding IDC and DIC legally responsible for Kirkpatrick's scheme to obtain the Air Force contract.

ETC appeals from the act of state, RICO, and Fifth Amendment rulings. The defendants, in addition to urging the correctness of these rulings, have cross-appealed from those alternative rulings that were adverse to them. Since the district court's grant of summary judgment on act of state grounds, if affirmed here, would obviate consideration of all other issues, we turn first to the act of state question.

II.

On review of a district court's grant of summary judgment, we utilize the same standard that the district court was required to apply. See *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3rd Cir. 1987). There is no real disagreement on the facts relevant to the district court's act of state determination. On this appeal, therefore, we are called upon to decide whether the appellees were entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

ETC's challenge to the district court's grant of summary judgment raises important issues about the proper application of the act of state doctrine. The doctrine is the judiciary's institutional response to the foreign relations tensions that can be generated when a United States court appears to sit in judgment on a foreign state's regulation of its internal affairs. Under the doctrine, the courts of this country will refrain from judging the validity of a foreign state's governmental acts in regard to matters within that country's borders. *See Restatement (Revised) of Foreign Relations Law of the United States* § 469[428] (1986). The party moving for the doctrine's application has the burden of proving that dismissal is an appropriate response to the circumstances presented in the case. *See Alfred Dunhill of London. Inc. v.*

Cuba, 425 U.S. 682, 694 (1976); *Williams v. Curtiss-Wright*, 694 F.2d 300, 303 n.4 (3rd Cir. 1982).

Although earlier formulations of the doctrine were grounded in notions of comity among sister states,[7] the core concern of modern act of state jurisprudence is preserving the separation of powers between the federal judiciary and the political branches of our government — especially, the executive branch, where primary responsibility for the conduct of foreign affairs is lodged. As explained by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id.* at 423. Thus, courts are required to decline to exercise jurisdiction over cases that may embarrass or impede the political branches of government in their conduct of foreign affairs. *See First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-68 (1972) (hereinafter "*Citibank*").

Sensitively applied, the doctrine can prevent judicial entanglement in international conflicts that are more appropriately resolved through political channels. Individual litigants and the enforcement of national policies pay a price, however, for this institutional self-discipline — its application in effect means that "on occasion individual litigants may have to forgo decisions on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy." *Citibank*, 406 U.S. at 769 (opinion of Rehnquist, J.). For this reason, the Supreme Court has not laid down rigid rules to govern the doctrine's application, but leaves it to the lower courts to determine whether a conflict between the judicial and political branches

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[7] *See Underhill v. Fernandez*, 168 U.S. 250, 252 (1898); *Restatement (Revised) of U.S. Foreign Relations Law* §469 [428] comment a.

exists in a particular case. *See id.* at 775-76 (Powell, J. concurring); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3rd Cir. 1979) (courts should analyze the nature of the questioned conduct and the effect upon the parties in addition to appraising the sovereign's role).

The main issue raised by ETC's appeal involves the proper application of the doctrine when a litigant invokes the doctrine as a defense to a suit for damage or injury stemming from a course of events that included some acts by officials of a foreign government. *Sabbatino* and the Supreme Court's other modern act of state cases have focused on state expropriations of private property, the clearest example of a political act that, to paraphrase Justice Harlan, touches on the nerves of the international community. *See Sabbatino*, 376 U.S. at 428. This has, however, left a broad range of governmental conduct — *e.g.*, court decisions; the granting of a license, patent, or some other state monopoly; or, as in this case, the award of a construction or procurement contract — for lower courts to consider.

The appellant has advanced several objections to the district court's act of state determination. Two of these objections lack merit. First, we agree with the district court's conclusion that the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application of the doctrine. It is true that certain governmentally authorized acts, such as the award of a patent or the acts of a bankruptcy trustee, are considered so routine as to be not of substantial concern to the political branches in their conduct of foreign policy. *See Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1265 (3rd Cir. 1987); *Mannington Mills*, 595 F.2d at 1294. But the award of a major defense contract generally does not result from a near-mechanical exercise of narrowly-defined governmental discretion. The award of a military contract, particularly one for a major project, is usually influenced by national security considerations — considerations that are far from routine.

We also agree with the district court that the socalled "commercial" exception to the act of state doctrine — an exception endorsed by a plurality of the Supreme Court but neither acquiesced in nor rejected by a majority, *see Alfred Dunhill of London v. Cuba*, 425 U.S. 682 (1976) — has no application to this case.[8] Under the commercial exception's terms, a court would not abstain from deciding a case involving the purely commercial act of a sovereign or one of its instrumentalities. *See Dunhill*, 425 U.S. at 695 (plurality opinion of White, J.). To determine whether an act is purely commercial in character, a court looks not to the purpose of the act but to its nature, i.e., whether the activity is of the type that an individual would carry on for profit. *Cf. Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2nd Cir. 1984)(applying the Foreign Sovereign Immunity Act's definition of "commercial"), *cert. denied* 471 U.S. 1125 (1985); *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2nd cir. 1981)(same), *cert. denied* 454 U.S. 1148 (1982). While the act of contracting will in many circumstances be properly characterized as commercial conduct, the decision to award a defense contract to one bidder or another is by its very nature governmental. *See Curtiss-Wright*. 694 F.2d at 302.

We part company with the district court, however, on the remainder of its act of state analysis. The district court employed a formulation of the doctrine that barred the adjudication of ETC's claims "if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of the foreign policy of the United States." *ETC*, 659 F. Supp. at 1392-93. The court found that adjudication of ETC's claims would lead inevitably

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[8] In *Curtiss-Wright* 694 F.2d at 302 n.2, this court noted that the commercial exception has not been endorsed by a majority of the Supreme Court. We have no occasion here for going beyond what was said in *Curtiss-Wright*.

to an examination of the Nigerian government's motives in awarding the Nigerian contract to Kirkpatrick. Because the district court was convinced that such a finding would be interpreted as criticism of the Nigerian Government, it concluded that this case presents the type of situation which precludes judicial inquiry. *See id.* at 1393.

In reaching its conclusion, the district court relied primarily on the interpretation of the act of state doctrine advanced in a Ninth Circuit case, *Clayco Petroleum v. Occidental Petroleum*, 712 F.2d 404 (9th Cir.), *cert. denied* 464 U.S. 1040 (1984). In *Clayco*, the plaintiff and the defendant, Occidental Petroleum, were in competition for an off-shore oil concession offered by Um Al Quywayn. Clayco alleged that it was first offered the concession, but that Um Al Quywayn's oil minister awarded Occidental the contract after Occidental paid the minister and his son over $400,000 in bribes. After the media discovered and reported the bribery scheme, the SEC brought an action against Occidental that charged violations of the Securities Exchange Act of 1934, based on the allegedly illegal payments. Occidental agreed to a permanent injunction, and to an internal review of its bidding practices. Clayco brought suit after the report prepared pursuant to that review revealed that illegal payments had in fact been made. *See Clayco*, 712 F.2d at 405-06. The district court dismissed *Clayco's* lawsuit on act of state grounds.

In a *per curiam* opinion, the Ninth Circuit affirmed the dismissal, concluding that the act of state doctrine barred adjudication of Clayco's claims. Although calling for a "flexible" approach to the doctrine's application, the court expressed its unwillingness to permit judicial inquiry into the motivation behind Um Al Quywayn's award of the concession. Since a determination that bribery had in fact occurred would "impugn or question the nobility of a foreign nation's motivation," and since "the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery," the court concluded that the executive's conduct of foreign affairs was sure to be embarrassed by such a proceeding. *See Clayco*, 712 F.2d at 407.

Clayco's expansive application of the act of state doctrine seems at variance with the principle which has guided this court, that the doctrine "is not lightly to be imposed...."[9] *Mannington Mills*, 595 F.2d at 1293. In *Mannington Mills*, the plaintiff claimed that defendant Congoleum violated the antitrust laws by using patents it allegedly procured by fraud to restrict the plaintiff's trade abroad. In bringing its suit, plaintiff did not ask the court to declare the foreign patents invalid. Instead, Mannington argued that its action was concerned only with proving Congoleum's violations of United States trade regulations. *See Mannington Mills*, 595 F.2d at 1290-91.

In *Mannington Mills* this court held, through Judge Weis, that the act of state doctrine did not bar adjudication of the plaintiff's claims. The court focused on the nature of the questioned conduct — the grant of a patent, an essentially routine act that raised no serious foreign policy concerns. *See id.* at 1294. But implicit in the opinion was an unwillingness to allow litigants to shield themselves from the consequences of illegal conduct abroad by invoking the act of state doctrine as a defense in American courts. *See id.* at 1293.

What was implicit in *Mannington Mills* became explicit in *Williams v. Curtiss-Wright*. Plaintiff Williams alleged that

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[9] One commentator has noted that *Clayco* has adopted the "strict" view of the act of state doctrine favored by other courts, most notably the Second Circuit in *Hunt v. Mobil Oil*, 550 F.2d 68 (2nd Cir.), *cert. denied* 434 U.S. 984 (1977), that precludes examination of a foreign sovereign's motivations. *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 357 n.190 (1986). Courts and commentators alike have criticized this interpretation of the doctrine as discouraging effective enforcement of United States regulatory policies against those who violate the law by engaging in illegal or anticompetitive conduct abroad. *See, e.g., Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied* 445 U.S. 903 (1980); *Sage International Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981); Bazyler, *supra*, at 347. This court has expressed similar concerns with too sweeping an application of the doctrine. *See Curtiss-Wright*, 694 F.2d at 304 & n.5.

defendant Curtiss-Wright monopolized the international market for a certain kind of jet engine, and claimed violations of the federal antitrust laws, as well as injury caused by common-law torts. Curtiss-Wright moved to dismiss Williams' complaint on act of state grounds, arguing that the doctrine precluded the examination of foreign governments' motives in refusing to buy engine parts from the plaintiff. The district court denied Curtiss-Wright's motion. *See Curtiss-Wright*, 694 F.2d at 301-02.

On appeal, this court, again speaking through Judge Weis, affirmed. This court rejected an approach to the doctrine that would in all circumstances foreclose judicial scrutiny of the motivations behind the procurement decisions of a foreign government. Judge Weis noted that a private litigant is not necessarily immune from antitrust liability simply because the illegal scheme involves some acts by an agent of a foreign government. *See id.* at 304 (citing *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)). The opinion stressed the importance of insuring that the act of state doctrine not interfere with the implementation of the policies served by antitrust and other regulatory statutes. "The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations.... " *See id.* at 304 (citations omitted). Having found that the record did not show that litigation of Williams' claims would impede the executive's conduct of foreign relations, this court held that application of the doctrine was not called for.

The formulation of the act of state doctrine outlined in *Mannington Mills* and *Curtiss-Wright* does not allow a court to invoke the doctrine on the basis of mere conjecture about the effect that the disclosure of certain facts might have on the sensibilities of foreign governments. Instead, these cases require that a defendant come forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government.

In the instant case, the district court's dismissal was based on little more than speculation about the effect that ETC's lawsuit might have on relations between the United States and Nigeria. The traditional justification for involving the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own borders, is not present in this case. Appellant does not seek to have the Air Force contract invalidated, nor does it seek compensation for its alleged losses from the Nigerian government. No Nigerian official is named as a defendant in the complaint.

Thus, to resolve ETC's claims on their merits, the district court would be called on simply to determine as a factual matter whether the appellees' alleged bribery of Nigerian officials motivated the award of the contract. The only information before the court authoritatively measuring the impact such a determination might have on the executive's conduct of foreign policy was the letter from Legal Adviser Sofaer.[10] That official pronouncement of State Department policy, as it relates to this litigation, reads as follows:

> In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:
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> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes

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[10] Assistant United States Attorney Levy's representations at Kirkpatrick's sentencing, *supra* note 5, were not made in the course of these proceedings, were not addressed to act of state questions, and antedated the Legal Adviser's letter by nearly a year.

> judicial questioning of the *validity* or *legality* of foreign government actions....
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied.
>
> These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the court from adjudicating this dispute.

See Letter from Abraham D. Sofaer, Appendix to this Opinion (December 10, 1986) (emphasis in original).

In sum, the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not

be compromised by orderly federal court adjudication of ETC's lawsuit.[11] We appreciate, of course, that the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts.[12] But the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.[13] As against that assessment, defendants

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[11] The Legal Adviser's letter does urge the court to exercise "caution and due regard for foreign sensibilities" at each stage of the litigation. In particular, the court is asked "to endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." Interpreting this passage as a failure on the part of the Legal Adviser to "sign off" completely on the act of state question, the district court dismissed the Legal Adviser's caveats with respect to the production of evidence as impractical and unconstitutional. *See ETC*. 659 F. Supp. at 1398.

The legal Adviser's expressions of concern about the possible damage to foreign relations that may result from wideranging discovery against foreign officials should not have been interpreted as a sign of ambivalence about the act of state question. Rather, the Legal Adviser simply urged the court to exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities. This advice is far from impractical. Foreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules, finding it intrusive and overbroad when compared to the European version of the fact-finding process. *See* Comment, *Antitrust Suits Involving Foreign Commerce*, 135 U. Pa. L. Rev. 1003, 1013-17 (1987). American judicial insensitivity to this foreign reaction has resulted in the enactment of "blocking" laws, i.e. laws that are specifically designed to block the Federal Rules' discovery provisions. *See id.* at 1016. The State Department's advice on this matter should be read as nothing more than a reminder to the district court of the complaints about American litigation with which the executive has become familiar.

[12] *See supra* note 6.

[13] That respect is, in our judgment, enhanced when the Legal Adviser is one who, in his former capacity as a federal judge, has addressed act of state problems with marked sensitivity and rigor in a particularly demanding context. *See Sharon v. Time*, 599 F. Supp. 538 (S.D.N.Y. 1984).

have not developed a factual record "showing that adjudication may hinder international relations ...." *Curtiss-Wright*, 694 F.2d at 304.

This litigation falls squarely within the teaching of *Curtiss-Wright*. In both cases, the plaintiff sought damages from defendants who allegedly used illegal tactics to influence a foreign government's award of a contract. In both cases, adjudicating the claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts. And, finally, the defendants in each case failed to demonstrate that the litigation process was bound to result in the type of institutional conflict between the political and judicial branches that would justify invoking the doctrine. We therefore will reverse the court's grant of summary judgment, and will remand the case for further proceedings.[14]

III.

Having found that the act of state doctrine is no bar to appellant's claims, we turn to the remaining issues presented. First, ETC argues that the district court erred in dismissing the state and federal racketeering claims. Second, ETC seeks reversal of the district court's order barring the deposition testimony of defendant Carpenter, who asserted his Fifth Amendment privilege when examined about Kirkpatrick's Air Force contract bid. Third, all of the defendants challenge the district court's determination that ETC has standing to bring its antitrust and RICO claims. And, fourth, defendant DIC reiterates its contention that it is insulated from liability for any

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[14] ETC has also argued that *Mannington Mills*' ten-factor balancing test should not result in a dismissal of the case on the basis of international comity. *See Mannington Mills*, 595 F.2d at 1297-98. Since the issue apparently was not raised below, and the record is substantially devoid of the sort of information called for by the *Mannington Mills* test, it would be inappropriate for this issue to be examined for the first time on appeal.

misdeeds of Kirkpatrick and Carpenter. We address these questions in turn.

A.

The district court dismissed ETC's state and federal RICO claims because it concluded that the amended complaint failed to allege facts establishing a pattern of racketeering activity. Noting that this court had not formulated a definition of the pattern requirement, the district court adopted a definition of pattern which would have required the appellant to allege facts establishing either (1) more than one criminal scheme undertaken by the defendants, or (2) a single, open-ended scheme. *See Environmental Tectonics v. W. S. Kirkpatrick & Co., et al.*, 659 F. Supp. 1381, 1390 (D.N.J. 1987). The district court found that ETC's amended complaint met neither prong of this test because it alleged a single scheme which was neither "continuous" nor "on-going."

The pattern requirement accepted by the district court has since been rejected by this court. In *Barticheck v. Fidelity Union Bank*, 832 F.2d 36 (3rd Cir. 1987), this court held that allegations of illegal conduct that constitute a single, completed criminal episode are in some circumstances sufficient to describe a pattern of racketeering activity. To determine whether a "pattern" exists, a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *See id.* at 38-39; *Saporito et al. v. Combustion Engineering*, No. 87-5144 Slip Op. at 24 (March 29, 1988).

The factual allegations in ETC's amended complaint satisfy this more flexible interpretation of RICO's pattern requirement. The predicate acts alleged in the amended complaint — mail and wire fraud, bribery, and violations of the Foreign Corrupt Practices Act — were all committed in connection with (or, to facilitate) the payments by Kirkpatrick to the Panamanian corporations. One could view these

payments as a single illegal payment separated into installments, and thus as a one-time affair, rather than as "criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." *Marshall-Silver Construction Co. v. Mendel, et al.*, 835 F.2d 63, 66-67 (3rd Cir.. 1987). But, to focus only on the series of payments — i.e., one bribe divided into four parts — is to ignore the complexity of Kirkpatrick's scheme. If the appellant's allegations are true, a European conglomerate, and two American corporations — successfully, and over a two-year period — organized to influence a foreign country's award of a procurement contract by illegal means. To facilitate their scheme, they hired a consultant who had contacts with Nigerian officials who were amenable to such an arrangement. This consultant also developed a sophisticated and outwardly legal front for the payments, thereby increasing the difficulty already inherent in detecting such a scheme. The wire and mail communications used to implement this undertaking account for numerous violations of federal law.

The nature of the acts alleged and the number of victims are also important considerations in this analysis. *See Barticheck*, 832 F.2d at 39. ETC claims to have suffered direct economic injury from the appellees' scheme. By illegally influencing the decisions of appellees' public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. *Cf. Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3rd Cir. 1987) (two separate schemes to bribe local government officials made victims of the "taxpayers and residents of the Town of Kearny"). Moreover, because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well.

Our assessment of the amended complaint in light of *Barticheck's* specific factors persuades us that ETC has alleged a "pattern of racketeering activity" within the meaning of the

statute. ETC may proceed on its RICO claim, and — assuming, as have the district court and the parties, that the pattern requirements for the New Jersey Anti-Racketeering act are substantially similar — on its state racketeering claims as well.

B.

ETC's final ground of appeal challenges the district court's decision that the Fifth Amendment privilege against selfincrimination shielded Carpenter from responding to deposition questions the answers to which might yield evidence that Carpenter had committed crimes under Nigerian law. ETC argues that the record does not establish any significant likelihood that responding to deposition questions here would expose Carpenter to trial in the courts of Nigeria. ETC also argues that, in any event, the Fifth Amendment is not a shield against foreign prosecution.

As summarized by the court below, the evidence adduced by Carpenter to establish the risk of criminal prosecution in Nigeria was as follows:

> Prior to his deposition, Carpenter submitted an affidavit...setting forth his;reasons for fearing criminal prosecution in Nigeria and detailing the factual basis of the privilege. As discussed earlier in the opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media attention and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian contract. Akindele further warned carpenter not to travel to Nigeria and to exercise care in traveling in Europe or

> Africa because there was a risk he would be taken by force to Nigeria. In January, 1986, Carpenter's attorney was informed by a United States Government official that "the Nigerians wanted to get [Carpenter] to Nigeria." This information, which originally came from Interpol, was relayed to Carpenter. Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated."

The magistrate reviewed this evidence in the light of the factors relevant to the risk of foreign prosecution enumerated by the Second Circuit in *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2nd Cir. 1982):

> [T]he court in resolving the issue [must focus on] whether there is an existing or potential prosecution of [the witness], what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a likelihood that his testimony given here would be disclosed to the foreign government.

The magistrate found "that, by defendant Carpenter's affidavit, there is a real fear that he might involuntarily be subject to the criminal jurisdiction of Nigeria." The district court concluded that "[t]he Magistrate's decision has not been shown to be clearly erroneous or contrary to law." *ETC*, 659 F. Supp. at 1401.

We disagree. We have no doubt that the testimony ETC sought to elicit at deposition might aid in a criminal prosecution of Carpenter by Nigeria, if such a prosecution were undertaken. However, it is not contended that Carpenter, who has already pleaded guilty to the criminal charges brought by the United States, could be extradited to Nigeria for the alleged bribes. The entire risk of prosecution in Nigeria rests, therefore, on the possibility that Carpenter would be kidnapped

by Nigerian authorities; and we do not think that possibility comes close enough to being a significant likelihood to carry the day. We are prepared to assume that a real fear, substantially grounded in fact, of being kidnapped by the agents of a foreign government with a view to prosecution by that government might well justify a witness' assertion of his or her fifth amendment privilege. But the fact that Carpenter has been admonished to avoid being kidnapped does not, in our judgment, constitute substantial proof that the feared conspiracy is more than gossamer. Nothing in this record supports an inference that kidnapping foreigners not resident in Nigeria in order to bring them to trial in Nigeria is characteristic of Nigerian law enforcement personnel.

That Carpenter is sincere in his apprehension of the risk does not mean that the apprehension justifies his assertion of the privilege. "The apprehension," as the court noted in *Flanagan*, "must be a real and reasonable one, based on objective facts as distinguished from subjective...speculation." *Flanagan*, 691 F.2d at 121. And this is because, as the Supreme Court made plain in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), rejecting the Fifth Amendment claim presented there, "the privilege protects against real dangers, not remote and speculative possibilities." In short, we think the record made by Carpenter does not constitute substantial evidence of "real dangers."[15]

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[15] Carpenter might have met his burden under this standard if he had been officially warned by the United States Government to forgo traveling abroad in order to avoid capture by Nigerian agents seeking to bring him to Nigeria for trial. Other evidence -- *e.g.* a pending prosecution or the institution or threatened institution of extradition proceedings -- might also have supported Carpenter's assertion of the privilege.

The justifications that Carpenter advances in this case, however, amount to nothing more than speculation about Nigeria's intentions. First, the warnings by Benson Akindele, who does not appear to be a Nigerian official, do not, standing alone, provide a basis for Carpenter's fear of prosecution. And the somewhat ambiguous representation of

(Footnote continued)

As noted above, ETC further contends that the Fifth Amendment is only a domestic shield, which guards against self-incrimination in other American courts, whether state or federal,[16] but does not protect one from American court orders which would compel testimony that might threaten incrimination in the courts of a foreign sovereign. That issue, which the Supreme Court found unnecessary to resolve in *Zicarelli, supra,* has generated a contrariety of views in the lower courts. The Tenth Circuit, *In re Parker*, 411 F.2d 1067, 1070 (lOth Cir. 1969), *vacated as moot,* 397 U.S. 96 (1970), and the Fourth Circuit, *United States v. (Under Seal)*, 794 F.2d 920 (4th Cir. 1986), have rejected the contention that the Fifth Amendment is extra-territorial in scope. The chief authority in support of an extra-territorial application is Judge Newman's opinion in *In re Cardassi*, 351 F. Supp. 1080 (D.Conn. 1972). *Cardassi* has been subscribed to by Judge Hufstedler, concurring in *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1169 (9th Cir. 1979), and has been followed by two district courts in this circuit. *See United States v. Trucis*, 89 F.R.D. 671 (E.D.Pa. 1981); *United States v. Kowalchuk*, No. 77-118 (E.D.Pa. 1978).[17]

Assistant United States Attorney Steven Levy with respect to Nigeria's "vital interest" in the American prosecution of Carpenter, *supra* note 5, falls short of suggesting that Nigeria was preparing to prosecute Carpenter.

Second, what Carpenter identifies as a warning from the United States is actually something more remote. The record suggests that the Nigerian government, if interested at all in Carpenter, sought only to question him about others rather than prosecute him. Moreover, Carpenter himself was not troubled enough by the warning to stay in the United States: he later traveled to the Bahamas. To justify his invocation of the privilege, Carpenter would have had to come forward with a good deal more than he presented to the magistrate.

16 *See Murphy v. Waterfront Commission*, 378 U.S. 52 (1962).

17 The question has been discussed, but not resolved, by the District of Columbia Circuit in *In re Sealed Case*. 825 F.2d 494, 497 (D.C.Cir. 1987), and by the Second Circuit in *Flanagan*, 691 F.2d at 124.

(Footnote continued)

Because we have determined that the present record does not, in any event, present a substantial risk that Carpenter would be subject to prosecution in the courts of Nigeria, we find it unnecessary to resolve the important constitutional question as to the reach of the Fifth Amendment that would otherwise be presented

C.

On cross-appeal, defendants raise two objections to rulings by the district court. The first contention, joined in by all of the defendants, is that the district court erred in concluding that ETC had standing to press its antitrust, RICO, and New Jersey Anti-Racketeering Act claims. This argument is premised on what the defendants perceive as factual deficiencies in ETC's amended complaint. In their view, ETC has not pleaded any facts which would establish, if true, that but for the defendants' illegal conduct it would have received the Air Force contract. The defendants also argue that ETC has pleaded no facts that would establish the payment of illegal commissions from the defendants to Nigerian government officials. The district court concluded that the amended complaint's allegations were sufficient to confer standing on ETC, and we agree with that assessment.

As far as ETC's antitrust standing is concerned, the allegations in the amended complaint as a whole make out an actionable violation of section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).[18] Congress enacted section 2(c), the

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[18] 15 U.S.C. § 13(c) states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative or

(Footnote continued)

Act's brokerage provision, primarily to curb one particular abuse by large chain store buyers, namely the use of "dummy" brokerage fees as a means of securing price rebates. *See Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371 (3rd Cir. 1985). The section has also been applied, however, in cases that involve commercial bribery. *See id.* at 371; *see also Rangen Inc. v. Sterling Nelson & Sons. Inc.*, 351 F.2d 851 (9th cir. 1965), *cert. denied* 383 U.S. 936 (1966)(company which bribed state purchasing agent liable to competitor for state contract under 2(c).

Although this court has concluded that as a general matter commercial bribery is actionable under 2(c), it has also held that a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice versa. *See Seaboard Supply* 770 F.2d at 372. The amended complaint alleges that Kirkpatrick paid the illegal commissions to the Akindele-controlled corporations, from which they were distributed to unnamed Nigerian officials. Though the allegation is not a detailed one, it clearly charges that illegal payments were passed from a seller to a buyer — a violation of 2(c).

Not every plaintiff who alleges an actionable claim under the antitrust laws has standing, however, to bring a private antitrust action. In order to proceed with a claim, a plaintiff must be able to demonstrate that it is within the class of those injured in their business or property who, based on a variety of factors, are best suited to further the purposes of the statute by remedying the violation alleged. *See Alberta Gas Chemicals, Ltd. v. E.I. Du Pont De Nemours and Co.*, 826 F.2d 1235, 1240 (3rd Cir. 1987). A private plaintiff does not have to prove price discrimination to recover for a violation of 2(c), *Seaboard Supply*, 770 F.2d at 371 n.3, but the plaintiff

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intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid.

must still meet the standing requirements to proceed. *See Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270-72 (5th Cir. 1979).

Because of the standing doctrine's malleability, it would be difficult to define with precision the contours of the class of potential plaintiffs who have standing to assert 2(c) claims. Indeed, this court's case-by-case approach to the standing requirement argues against such an attempt. *See Alberta Gas Chemicals*, 826 F.2d at 1239-41. We need not do so in this case, moreover, because it is generally agreed that a direct competitor of a company that obtains a contract through commercial bribery has standing to press a 2(c) claim against the briber. *See Cool Attic*, 587 F.2d at 271-72; *Municipality of Anchorage v. Hitachi Cable*, 547 F. Supp. 633, 640 (D. Alaska 1982); *Computer Statistics v. Blair*, 418 F. Supp. 1339, 1348 (S.D. Tex. 1976); III E. Kintner and J. Bauer, *Federal Antitrust Law* § 26.12, at 529-30 (1982).

We agree with the district court that ETC's amended complaint alleged sufficient facts to establish the kind of injury that would confer standing to bring a claim against the defendants. Plaintiff alleged that it and the defendants are both in the business of supplying aeromedical facilities and equipment to foreign air forces, and that both plaintiff and defendants were in direct competition for the Nigerian Air Force bid. As the district court noted, short of alleging that it was next in line for the Nigerian contract, ETC could not have pleaded a more direct injury from defendants' alleged violation of section 2(c).

The question of ETC's standing to bring its RICO and Anti-Racketeering Act claims is somewhat easier to resolve. To have standing to assert a civil RICO claim, ETC need only allege an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation. *See Town of Kearny*, 829 F.2d at 1268 (quoting *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987)). ETC's allegations in the amended complaint of injury from the bribery scheme — a scheme that the amended complaint

charges with sufficient factual specificity — meet this standard. We also assume, as did the district court and the parties, that the New Jersey Anti-Racketeering Act's requirements are essentially the same as the federal standards.

D.

Finally, defendant DIC, one of Kirkpatrick's corporate parents, contends that the it is entirely immune from liability. ETC claims that liability for the alleged wrongful acts of the Kirkpatrick group can be imputed to DIC on either of two theories: by piercing the defendant's corporate veil, *Melikian v. Corradetti*, 791 F.2d 274 (3rd Cir. 1986), or by finding that Carpenter acted as DIC's agent in carrying out the bribery scheme, *Japan Petroleum Co. v. Ashland Oil*, 456 F. Supp. 831 (D. Del. 1978). The district court found that the amended complaint minimally alleged "a relationship among [DIC], IDC, Carpenter, and Kirkpatrick sufficient to support the potential imposition of liability upon [DIC] or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick." *ETC*, 659 F. Supp. at 1388. The court also concluded that ETC and the defendants should have the opportunity to proceed with discovery so that the facts defining the relationship of DIC, IDC, Carpenter and Kirkpatrick may be fully developed. *See id.* at 1389. We find no reason to question such a course, which should produce a record on the basis of which the question of DIC's liability can be properly determined. *See Craig v. Lake Asbestos of Quebec, Ltd.*, No. 87-1254 (3rd Cir. March 31, 1988).

Conclusion

We therefore will reverse the district court on its act of state decision, its dismissal of plaintiff's RICO and Anti-Racketeering Act claims, and its affirmance of the magistrate's decision upholding Carpenter's assertion of the Fifth Amendment privilege. As to the other issues, we will affirm the district court. We will remand this case for proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

(Appendix to Opinion of Judge Pollack)

December 10, 1986 Letter to Abraham D. Sofaer to the Hon. Alfred J. Lechner, Jr. is reproduced at A-267-269.

Public Servant taking Gratification in Respect of Official Act

Whoever

(i) being or expecting to be a public servant

(ii) accepts or obtains or agrees to accept or attempts to obtain

(iii) from any person

(iv) for himself or for any other person

(v) any gratification whatever, whether pecuniary or otherwise, other than lawful remuneration

(vi) as motive or reward

(*a*) for doing or forbearing to do any official act

or (*b*) for showing or forbearing to show in the exercise of his official functions favour or disfavour to any person

or (*c*) for rendering or attempting to render any service or disservice to any person with any department of the public service or with any public servant as such

shall be punished with imprisonment which may extend to seven years (N.N.) [*three years* (Sudan)] or with fine or with both; if such public servant is in the service of the Government of the Northern Region or the Government of the Federation in a judicial capacity or carrying out the duties of a police officer, with imprisonment which may extend to fourteen years or with fine or with both.

If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office and that he will serve them, he may be guilty of cheating but he is not guilty of the offence under this section (expln. 1).

A public servant, who receives a gratification as a motive for doing what he does not intend to do or as a reward for what he has not done, is guilty of an offence under this section (expln. 2) (s. 115, N.N., 128, Sudan P.C.).

Public servant

See commentary to section 10, N.N., 14, Sudan P.C. at page 22.

A public servant does not cease to be a public servant because he is on leave.[10] A police officer posted to a particular police station does not cease to be a public servant when he is dealing with a person residing in the territorial jurisdiction of another police station.[11]

Expecting to be

It must be proved that the offender gave the other party to the transaction reason to believe that he was about to become a public servant and that he himself also believed it. If he did not expect to become a public servant but obtained a gratification from another by deceiving that other into believing such to be the case, he would not be guilty under this section but he would be guilty of cheating.[12]

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10 *Venkatasubbiah*, In *re-*, A.I.R. [1948] Mad. 68.

11 *Maxbooluddin* v. R., A.I.R. [1950] All. 5.

12 Expln. 1.

Accepts, obtains, agrees to accept or attempts to obtain

The public servant who obtains or agrees to accept or attempts to obtain a bribe is the only person punishable under this section. If A offers a bribe to a public servant, who refuses it, A is not punishable for abetment of the offence defined in this section but under section 118, N.N., 131, Sudan P.C. Merely asking for a bribe is an attempt to obtain it.[13] It is not necessary to prove how the bribe was demanded or obtained, if it was, in fact, obtained.[14] It is no defence that payment of the bribe was postponed.[15]

For any other person

The person for whom the gratification is obtained or sought need not be a public servant. A, a magistrate, obtains from Z, a merchant, a situation in Z's office for A's brother, B, as a reward for deciding a case in Z's favour: A is within the section.[16] If B is aware of the transaction between A and Z, R is punishable under section 121, N.N., 134, Sudan P.C.

Taking Gratification in Order to Influence Public Servant

Whoever

(i) accepts or obtains or agrees to accept or attempts to obtain from any person

(ii) for himself or any other person

(iii) any gratification whatever, whether pecuniary or otherwise

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13 *Emp.* v. *Baldeo Sahai*, (1879) I.L.R. 2 All. 258.

14 *Tapeshri Prasad* v. *Emp.*, A.I.R. [1947] All. 84.

15 *Indra Nath Benerjee* v. *E. G. Rooke*, (1909) 14 C.W.N. 101.

16 Ill. (*a*).

(iv) as a motive or reward for inducing, by corrupt or legal means, any public servant

(*a*) to do or forbear to do any official act

or (*b*) in the exercise of the official functions of such public servant to show favour or disfavour to any person

or (*c*) to render or attempt to render any service or disservice to any person with any department of the public service or with any public servant as such

shall be punished with imprisonment for a term which may extend to three years or with fine or with both (s. 116, N.N., 129, Sudan P.C.).

An official may himself be uncorruptible but his wife, servants, relations and even his friends may take advantage of his position to secure bribes by professing ability to influence him in the exercise of his official functions. This section is particularly directed against such persons. If one public servant acts as an agent of another public servant to solicit or receive bribes on behalf of the latter, he is punishable under the preceding section.

A pleader who receives a fee for arguing a case before a public servant and a person who for a fee prepares a memorial for presentation to a public servant urging him to do something for the benefit of the payer in the exercise of the public servant's official functions is not within the section, because neither of them intends to use corrupt or illegal means to influence the public servant. But if a pleader takes a sum of money from a client for presentation to a judge as an inducement to the judge to decide in the client's favor, he is within the section.

Abetment by Public Servant of Taking Gratification in Order to Influence Him

Whoever

(*a*) being a public servant in respect of whom an offence under section 116, N.N., 129, Sudan P.C. is committed

(*b*) abets the offence

shall be punished with imprisonment which may extend to three years or with fine or with both (s. 117, N.N., 130, Sudan P.C.).

This is a special provision for abetment of the offence of taking an illegal gratification, when the person who takes or agrees to take or asks for a bribe is not a public servant but he is abetted by a public servant. This section does not apply when the public servant himself accepts or agrees to accept or asks for a bribe. The abetment may be in any of the ways mentioned in section 83, N.N., 84 Sudan P.C., by instigation, conspiracy or intentional aid.

In India officials who were habitually corrupt usually employed their wives or servants to solicit and receive bribes, so that it was sometimes difficult to prove the connection between the public servant and the person who solicited or accepted the bribes. If the public servant knowingly enjoys the benefit of gratifications received by such persons, that is evidence pointing to the conclusion that he is guilty under this section.

Offering or Giving Gratification to a Public Servant

Whoever

(*a*) offers or gives or agrees to give

(*b*) any gratification whatever, pecuniary or otherwise

(*c*) in the circumstances and for any of the purposes mentioned in sections 115 or 116, N.N., 128 or 129, Sudan P.C.

shall be punished with imprisonment which may extend to three years or with fine or with both (s. 118, N.N., 131, Sudan P.C.).

In the Indian Penal Code there is no corresponding section. This is for the specific psychological purpose of emphasising that when a public servant is bribed, whether he solicited the bribe or not, he is the person primarily liable. The result is that, in India, if a bribe is offered and accepted, the giver is liable for abetment under the section corresponding to sections 115, N.N., 128, Sudan P.C. or 116, N.N., 129, Sudan P.C., read with section 85, N.N., 84, Sudan P.C.; if the bribe is not accepted, the offer/or is liable under the sections corresponding to section 115, N.N., 128, Sudan P.C., or 116, N.N., 129, Sudan P.C., read with section 92, N.N., 91, Sudan P.C. But in Northern Nigeria and the Sudan the person who offers or gives a

Third Party Profiting by Gratification

Whoever

(*a*) knowingly

(*b*) profits

(*c*) by any gratification or benefit

(*d*) obtained in any of the circumstances mentioned in sections 115, 116 or 119, N.N., 128, 129 or 132, Sudan P.C.

(*e*) but does not take any active part in obtaining such gratification or benefit

shall be punished with imprisonment which may extend to one year or with fine or with both (s. 121, N.N., 134, Sudan P.C.).

The bribe taker, when a public servant himself, is dealt with in sections 115 and 119, N.N., 128 and 132, Sudan P.C.; when he is a layman, in section 116, N.N., 129, Sudan P.C. The public servant who employs another to solicit and accept bribes is dealt with in section 117, N.N., 130, Sudan P.C. The offeror or giver of a bribe is dealt with in sections 118, 120, N.N., 131, 133, Sudan P.C. This section deals with the person who neither solicits, takes, gives, offers nor takes an active part in the transaction, but who knowingly benefits by it.

If Z, a banker, gives B, the brother of A, a post in Z's bank, in consideration of A deciding a suit in Z's favour and B accepts the post, knowing of the transaction, B is within the section. If A, a collector of taxes, whose duty it is to assess taxes payable from time to time by Z, a merchant, takes a lease of a house from Z at an inadequate rent, and A's wife, W, knowing these facts, resides in the house with A, W is within the section